Childrens Court of Queensland

First Annual Report

September 1993–August 1994

LAID UPON THE TABLE OF THE HOUSE

THE CLERK OF THE PARLIAMENT.

CHILDRENS COURT OF QUEENSLAND

Chambers of the President

September, 1994

The Honourable Dean Wells MLA
Minister for Justice and
Attorney-General and
Minister for the Arts

Sir,

In accordance with the requirements of s.22 of the Childrens Court Act 1992, I have the honour to submit to you for presentation in Parliament the first Annual Report of the Childrens Court of Queensland, which covers the period 1 September 1993 to 31 August 1994.

Judge McGuire
President of the Childrens
Court of Queensland

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1. INTRODUCTION

When I was approached to take on the newly created position of President of the Childrens Court of Queensland, I hesitated before accepting. I asked for a week to consider the pros and cons. I consulted a number of informed and trusted friends. Their advice almost without exception was: 'Don't touch it. You're being used. Juvenile crime is raging out of control. Nobody can do anything about it. If you take it on, you'll land in trouble'.

The issue of the management and treatment of juvenile crime is a divisive and sensitive subject matter. It engenders in the community every sort of response. It is a controversial subject, involving moral and social judgments in which opinions strongly differ.

Most people are aware of the child crime controversy, of the opposing views as to how it should be handled and of the deep and seemingly absolute convictions that the subject inspires.

One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude towards life and family and their values, and the moral values one establishes and seeks to observe are likely to influence and colour one's thinking and conclusions on the subject.

So I set about studying the new legislation: the *Childrens Court Act 1992* and the *Juvenile Justice Act 1992*. On reflection, and in spite of the advice my good friends had given me, I decided to accept the position.

My reasons for accepting were twofold. First, after a careful study of the juvenile justice legislation, I felt that it was comprehensive and enlightened legislation which provided the wherewithal to control juvenile crime. Second, I had harboured a belief for a long time that the present approach to combating crime generally was not proving very effective and was not producing the desired results. There was therefore something fundamentally wrong with the approach.

Experience gained over 40 years in the practice of the legal craft (21 as a barrister and 19 as a Judge) told me that adult professional or career criminals persistently causing the greatest damage to our society started their careers as juveniles and that perhaps we were expending too much time, effort and money at the wrong end of crime control. It was, I thought, a case of closing the gate after the horse had bolted. What was needed was to attack crime at the right end: at its beginning, with the incipient young offender, and nip it in the bud, if possible,

there and then, before it burgeoned out of control. So I concluded that the juvenile courts were probably the most important courts in the land. Long and bitter experience in the criminal courts had taught me that a high percentage of persistent professional criminals started as juvenile delinquents who made repeated appearances in the Childrens Court. If their criminal tendencies could have been curbed or controlled through a judicious management of the juvenile justice system, society would have benefited beyond measure and would have been spared untold anguish and expense.

If the task of controlling juvenile crime was to be tackled in a proper, effective and thorough-going manner, there had to be a person put in charge of the operation for the whole of the State. Hitherto, no-one was placed in control. Magistrates in Queensland conducted Childrens Courts and, at the level of higher courts, all the Judges dealt with serious – that is, indictable – juvenile crime. There was no-one to take control, coordinate the effort and supervise the operation state-wide. In short, what had been happening was that the management of juvenile crime was spread over the whole court system. There was no attempt to channel it in a particular direction and, to that end, appoint specialist Magistrates and Judges to do the work.

The new legislation changes all this. It attempts to correct the errors of the past. There are now specialist Childrens Court Magistrates and there are specialist Childrens Court Judges, and there is someone to coordinate and supervise the whole activity state-wide.

The legislation has been in force one year. It is not possible to radically change an entrenched system in so short a time. But there are, I believe, positive signs emerging that significant inroads are already being made into the management and control of juvenile crime in Queensland.

I liken the process so far to a pilgrim's progress, not unlike the pilgrim's progress John Bunyan wrote about in memorable allegorical language in his masterpiece *The Pilgrim's Progress* as long ago as 1678.

What follows in this report are 'station stops' on the pilgrim's progress towards a better understanding of, and ultimate mastery over, the curse of child crime.

I should warn the reader that the format and style of this report are rather unconventional, but I make no apology for that, for I would not like to think that child crime will ever be considered a conventional subject matter.

SCHEMA OF REPORT

The schema of the report is as follows:

Soon after my appointment as President of the Childrens Court of Queensland, I determined, after consultation with the responsible Ministers, that there should be a court ceremony to 'launch' the new legislation. The ceremony was conducted in the Childrens Court building and was attended by the Honourable the Attorney-General, Mr Dean Wells, the Honourable the Minister for Family Services and Aboriginal and Islander Affairs, Ms Anne Warner, their Directors-General, Mr Barry Smith and Ms Ruth Matchett, and representatives of the Department of Justice and Attorney-General and the Department of Family Services and Aboriginal and Islander Affairs, as well as by members of the general community.

In my opening remarks I said, 'The primary purpose in ordering this occasion is to introduce the new Childrens Court and Juvenile Justice legislation and to inform you of its aims, its hopes, and its expectations'.

I publish in full the speeches of the Ministers and my inaugural address (pp. 10–21). It is important to note that the observations made by the speakers, including myself, were made without the benefit of any experience of the day-to-day operation and practical application of the legislation.

At the invitation of the Symposium Committee, I presented a paper on juvenile justice to a symposium of Queensland lawyers at the Gold Coast on 4 March 1994. At the time of presentation the new Childrens Court had been functioning for six months. I wrote the paper with the limited perspective which so short a period affords. Now, with the benefit of a full year's experience behind me, I adhere substantially to the views expressed in the symposium paper. The paper is published in full (pp. 22).

There is some duplication in the Paper of what appears in my Inaugural Address but, in the interests of preserving the integrity of the Paper as a whole, I have decided not to edit out the duplication; the Symposium Paper stands as a separate document on Juvenile Justice.

Next, I discuss certain aspects of the legislation under the broad headings:

- Right of election
- Sentencing powers – are they adequate?
- Publication
- Cautioning
- Parental participation
- Procedures adopted
- Power of arrest
- Sentence reviews
- *Ex officio* indictments
- Pre-sentence reports
- Detention centres

and draw attention to what I perceive to be deficiencies, anomalies and lacunas in the legislation discovered in the light of experience, and make corrective and other recommendations with a view to enhancing the legislation (pp. 45–117).

Closely associated with the administration of the relevant legislation are a miscellany of matters:

- Legal and other representation (p. 118)
- Public education and information (p. 119)
- Childrens Court budget (p. 121)

That is followed by statistical tables from a comparative and analytical study from which certain conclusions can be drawn (p. 128).

I follow that with a diversion into 'Neglect of the young' and 'Home and school discipline' (pp. 147–150).

Then I review 'The English experience' to see what lessons can be learnt from it (p. 151).

After that I talk about my visit to the Aboriginal community of Aurukun on 3 June 1994. Because of its obvious relevance to the Aboriginal community of Aurukun and communities like Aurukun, I take the liberty of publishing for the first time a submission I made way back in 1981 to the Australian Law Reform Commission, at the invitation of the Commission, on 'Aboriginal Customary Law – Recognition?' (pp. 156–176).

And last of all, I propose a solution to child crime. My belief is that the primary causes of child crime are family breakdown and associated lack of discipline.

There is a serious malaise in our society which threatens its very existence: guns, drugs, violence of all kinds, including domestic violence, crime of all kinds, including crimes by children and against children, and last and not least, the breakdown of family.

How can this malaise be cured? Can it be cured by governments, and laws and courts? The short answer is no, not alone. Governments cannot change people and make them good, any more than courts can. Moral authority rests with the families and the communities, which are the repositories of responsibility. A law-enforced morality has never, in all of human history, succeeded. Law cannot recreate a lost morality. 'Duty', said the historian Lord Acton, 'is not taught by the State'.

We have tolerated the collapse of family and there has been an eclipse of individual responsibility. No abdication has had more fateful consequences. But we should not regard the situation as permanent or irretrievable. We can yet construct a framework for our children within which to learn morality and responsibility.

The moral dilemma can only be resolved by an acceptance of the moral imperative. What is needed is a moral renaissance, a moral reawakening, a restoration of ordinary goodness – in short, a return to 'the good and the right way' (1 Samuel 13:23).

To the last substantive section of the report I assign the title 'The moral dimension' (p. 177).

I round off the report with 'Penultimate reflections' and 'Conclusion' (pp. 189–190), followed by 'Acknowledgments' and a 'Summary of recommendations' (pp. 191–196).

2. INAUGURAL PROCEEDINGS

The Honourable Dean Wells, MLA, Minister for Justice and Attorney-General and Minister for the Arts, on behalf of the Government of Queensland

The Honourable Anne Warner, MLA, Minister for Family Services and Aboriginal and Islander Affairs

HIS HONOUR: Mr Attorney, Minister, Directors-General, ladies and gentlemen. Thank you for taking the time and trouble to dignify these proceedings by your distinguished presence. The primary purpose in ordering this occasion is to introduce the new Childrens Court and juvenile justice legislation and to inform you of its aims, its hopes and its expectations. Mr Attorney?

THE HONOURABLE DEAN WELLS, MLA: May it please the Court, I appear on behalf of the Government of Queensland to congratulate Your Honour on your appointment as the first President of the Childrens Court of Queensland.

The establishment of this Court is an important part of the new legislative scheme for juvenile justice in Queensland. Juvenile crime is a sensitive and perennial issue. The effects and the causes of juvenile crime are constantly being examined and re-examined by the community. It is imperative that the community's response to juvenile crime is a response which not only furthers the public interest, but is clearly seen to further the public interest. In large measure Your Honour's Court will be seen to be delivering that response.

The establishment of this new Court reflects a shift in emphasis from a welfare model to a justice model, with greater emphasis on due legal process. This is a new jurisdiction for the District Court. The new Act brings to juvenile justice a new range of remedies, a new range of sentencing options and new judicial hierarchy. To an extent, therefore, it constitutes a new area of law. Obviously it constitutes an area of law on which public policy issues will constantly impinge.

The establishment of this new Court will require, on the part of the community, a heightened awareness of the concept of judicial independence and, on the part of the judiciary, a high degree of sensitivity to community concern. It is a jurisdiction which will require measured judgment in the complex and often delicately balanced human and social issues which come before the Court.

May it please Your Honour, although you are now President of the Childrens Court, you will remain very much a District Court Judge. You have told me it

was your wish, and I know it was the wish of the District Court, that the President of the Childrens Court should remain a District Court Judge, performing the functions of District Court Judge, including circuits. The legislative scheme provides for this. The Childrens Court will be a distinct part of the legal system, but not a fragmented enclave of the legal system. The children of Queensland will now have their own Court, but the judicial officers who constitute your Court will not be isolated from the mainstream of judicial activity. You will continue to work as a mainstream District Court Judge in addition to your Childrens Court work.

To this end I will, in the near future, be advising Her Excellency the Governor to appoint additional officers to your Court at both the District Court and Magistrate levels. The Court will then comprise Your Honour as President, other District Court Judges who will be appointed pursuant to the statute, having regard to their particular interest and expertise in matters relating to children, and at least one Magistrate. In that way it will be assured that there is an adequate number of judicial officers to facilitate fair, efficient and swift legal process in respect of all Childrens Court matters.

May it please Your Honour, there are many people in Court here who wish the new legislative scheme and your Court well. My Director-General is present, as are representatives of the Bar and the Law Society. May it please Your Honour, on behalf of the Government and people of Queensland, may I congratulate you on your appointment as the inaugural President of the Childrens Court and wish you and your Court well in all your deliberations.

HIS HONOUR: Thank you, Mr Attorney. Minister?

THE HONOURABLE ANNE WARNER, MLA: May it please Your Honour, I seek leave to address the Court.

HIS HONOUR: Leave is granted.

THE HONOURABLE ANNE WARNER, MLA: May it please the Court, this is an historic day in Queensland's legal history. It is my privilege to be present to witness the commissioning of Your Honour as the first Judge of the Childrens Court and President of the Childrens Court of Queensland.

This new judicial appointment is integral to the successful implementation of the reforms to the juvenile justice system that are enunciated in the *Juvenile Justice Act 1992* and the *Childrens Court Act 1992*, which I introduced to the Queensland Parliament last year. It is my intention to seek Governor-in-Council's approval for these Acts to be proclaimed on 1 September 1993.

Your Honour, I believe you will bring to this Court not only a wealth of knowledge derived from your past experience to the judiciary of this State, but also your commitment to a fair and just society in which young people are afforded both the protection of the law and opportunities to repay their debt to society for their transgressions. Your task in presiding over this Court will not always be an easy one. When courts find children guilty of offences, particularly serious offences where harm has been done to others, determining the most appropriate penalty to impose is problematic. On the one hand, the needs of the victim and the community's desire for adequate punishment must be balanced with due recognition of the age and maturity of the child and their need for education, rehabilitation, nurturing and reintegration into society.

It is my hope that proclamation of the Juvenile Justice Act will make this difficult task for courts a little easier. The Act will provide courts with an increased range of sentencing options and will repeal those aspects of the current Childrens Services Act that were so rightly criticised by members of the judiciary and others. Here I refer to the wide discretionary powers of the Director-General of my Department to determine the duration of a child's detention in custody and the provision that allowed children found guilty of serious offences to be sentenced to an indefinite period of detention awaiting Her Majesty's Pleasure being known.

As I said, the Juvenile Justice Act provides an increased range of sentencing options, including good-behaviour orders, community-service orders, probation orders, detention orders of fixed duration and the option of detention for a fixed period of more than two years for the most serious offender.

The Juvenile Justice Act has been described as 'fair but firm' because, in addition to the sentencing options I have described, the Act for the first time sets down in legislation the steps to be followed by police when interrogating a suspected young offender. Also, the Act provides a legislative basis for police cautioning of first and minor offences. This successful scheme has been in place in Queensland

for some years and under the Act will now have the legal recognition it deserves, along with the necessary safeguards.

The Act is firm but fair because it is founded on the principle that children should be dealt with in a just and equitable manner, that they should be held accountable for their actions, that their rehabilitation is an important goal and that special protections are required due to their age, vulnerability and also their capacity to change, mature and take their place as worthwhile citizens in our community.

To complement these reforms, the Childrens Court Act establishes the judicial office of President of the Childrens Court of Queensland. The President will be responsible for issuing practice directions for all Childrens Courts. These practice directions will ensure that Court procedures and, most importantly, Court decisions are more readily understood by children. Also, the President will have a role in reviewing sentencing decisions of Courts to assist in equitable dispositions for young offenders in this vast State.

There will be greater accountability to the public generally regarding the operation of this jurisdiction. Annual reports by His Honour will be tabled in Parliament and will afford Queenslanders an impartial report that analyses the operations of the Court.

It has long been my view that the community is deeply concerned about juvenile crime. Whilst there are many exaggerated claims surrounding the nature and level of such crime, we must not be complacent about this very real problem. This Government, in addition to overhauling the juvenile justice system, has implemented a juvenile crime prevention strategy. Youth and Community Combined Action projects, named YACCA for short, have been established in 20 towns and suburbs. The efforts of service clubs, youth groups and church and community groups have been combined to focus on the underlying causes of juvenile offending – boredom, unemployment, drug and alcohol misuse, homelessness and family tensions. Innovative projects that involve young people themselves are emerging in these areas. The program should help us as a community to prevent juvenile offending. Courts have the valid role of establishing guilt or innocence and imposing sentences that will assist in rehabilitation. Action at the local community level that has a preventive focus is vital too.

In conclusion, I wish to congratulate Your Honour on his appointment to this new and significant position as President of the Childrens Court of Queensland. I have welcomed your intention to personally visit the various facilities and programs offered by my Department to young offenders.

Addressing the issue of juvenile crime in our community requires the collaborative effort of many people, including the judiciary, the police, officers of my Department, the legal profession, church and community groups, all parents and young people themselves. The reform of the juvenile justice legislation and the development of YACCA, our juvenile crime prevention strategy, are good examples of that collaborative effort. I place on record my thanks to all involved and look forward to their contribution following proclamation of the Acts.

Under your stewardship, Your Honour, I look forward to a new era for juvenile justice in this State – an era which is attuned to both the expectations of our community and the needs of young people.

HIS HONOUR: Thank you, Mr Attorney; thank you, Minister. You have both spoken of me more generously than I had reason to expect. Ladies and gentlemen, the Childrens Court Act and its companion Act, the Juvenile Justice Act, were enacted in August 1992. It is expected that they will be proclaimed on 1 September 1993.

Because the law and the practice and procedures in relation to the administration of juvenile justice had become outmoded and in many respects inadequate to deal with the current disturbingly high level of juvenile crime, the whole system of juvenile criminal justice has been overhauled. The outcome of this overhaul has been the enactment of two significant pieces of legislation: the *Childrens Court Act 1992* and its companion, the *Juvenile Justice Act 1992.*

A child is defined as a person who has not turned 17 years. However, the Juvenile Justice Act contemplates increasing the age, by regulation, to include a person who has not turned 18 years.

This comprehensive legislation contains commendable measures to combat juvenile crime. This is not the time to embark on a detailed consideration of the provisions of the Acts. However, it may be said in general terms that the legislation is an earnest endeavour to establish a code for dealing with children who have crossed the line dividing errant behaviour deserving admonishment from criminal conduct calling for the imposition of the sanctions of the criminal

law. For good and proper reasons the underlying ethos of the new legislation places emphasis on the rehabilitation of offending children and their reintegration into society.

The explanatory note to the Juvenile Justice Act admirably encapsulates the central concept of the legislation: it is to encourage offending children to accept responsibility for their behaviour and at the same time to give them the opportunity to develop in responsible, beneficial and socially acceptable ways with due regard for family values.

However, for serious offenders and repeat and intractable offenders, the power of detention for significant periods exists. The power of detention is, however, to be used as a last resort.

A serious offence is defined as an offence which attracts life imprisonment or an offence which, if committed by an adult, attracts 14 years or more imprisonment. Comprehended by serious offences, therefore, are such offences as murder, robbery, rape and housebreaking.

A Childrens Court Judge has power to detain a child for up to 14 years for a life offence and up to 7 years for a serious offence other than a life offence.

The sentencing options generally have been sensibly expanded to allow Childrens Court Magistrates and Judges wide sentencing discretions, including probation and community service, and compensation orders against a parent whose wilful failure to ensure proper care of, and supervision over, a child has substantially contributed to the child's offence.

Children who are sentenced to detention are to be held in centres established under the Act. The Chief Executive Officer has the responsibility for establishing programs and services designed to rehabilitate and educate the child so that on his[1] release he will be integrated into the community and become a useful, law-abiding member of it.

[1] *For ease of reading, and because the vast majority of children who come before the Courts are male (see the tables on pp. 133–149), the masculine pronoun has been used when referring to individual child offenders.*

I should like to say right at the beginning that the quality of the staffing of detention centres and the educational and other programs undertaken by detainees will be of vital importance in the rehabilitation of offenders and therefore the long-term success of the endeavour. The whole idea of detention centres is to segregate young offenders from adult prisoners – some of them old lags – held in conventional prisons. I am hopeful that the detention centres will prove to be places of learning and enlightenment and, we must hope, discipline. No-one wants to return to Dickens's time, when workhouses were places of dark inhumanity. I should let it be known that I intend to make periodic visits to the centres to inform myself of their standards and utility.

I next wish to deal with the topic of sentencing.

If there is one topic of equal concern to lawyer and layman alike, it is the high level of crime – especially juvenile crime – and how to deal with it.

There is nothing more detrimental to the law than that the wrongdoer should go undetected and unpunished. The image of the law is impaired if the kidnapper extracts his ransom and gets clear, if the mugger smashes up old ladies and goes free, if the burglar plunders every house in the street and is undiscovered, if the sexual pervert molests little children with impunity, if the company director defrauds the shareholders and gets away with it.

The Juvenile Justice Act prescribes sentencing principles for juveniles. The emphasis throughout is on rehabilitation and reintegration into the community. A custodial sentence – in the Act called a detention order – is an option of last resort.

What, then, should be the aims of sentencing? They should be to treat, reform or rehabilitate the offender, to compensate the victim, to punish, to deter, and to protect the public. Not all these aims can be achieved by any given sentence. For example, if a custodial sentence is warranted, it would be illusory, in most cases, to combine it with a compensation order compensating the victim of the crime. There is, if I may so, no such thing as an absolutely right sentence.

So far as juvenile offenders are concerned, a sentence of detention will be reserved for those guilty of serious crimes, and for those repeat, incorrigible and intractable offenders who have proved to be impervious to community-service orders and who treat the Courts with defiance and contempt.

If a young offender has been given the benefit and assistance of probation, has been conditionally discharged, has been given a community-service order, what, I ask you, is the Court to do if he comes back again, again, and again! Short of repeating the same threats and wagging the same finger once more, there must surely be a custodial sanction available.

There has been of late a spate of much-publicised offending by youngsters. I need only name two types of prevalent offences: housebreaking and car-stealing. And regrettably there have been some instances of sensationally violent offences committed by the very young – at times against the very elderly.

The Courts see the end result of criminal activity – the committed crime – and must deal with it as best they can. The causes of juvenile crime are varied and complex. There are often socioeconomic factors involved. This is not a suitable occasion to speak on that subject.

And it must be remembered that the Courts cannot make people good or more responsible to one another. The Courts are only one of a number of social influences. We happen to be going through a period when selfish crime is on the ascendant. We must hope it will pass, that the social influences of home and education and good government and the removal of the curse of high unemployment, especially as it impacts on the young, will improve the moral climate. There is no doubt in my mind that there is a definite correlation between pervasive unemployment and crime.

There is another procedure covered by the legislation to which I give my unqualified endorsement. I refer to the cautioning provisions of the Juvenile Justice Act.

In appropriate circumstances, especially where the alleged offence is trivial and the child has no history of offending, a caution would suffice. The power to caution is restricted to an experienced officer authorised by the Commissioner of Police. The purpose of a caution is to divert the child who commits a minor offence from the Courts' criminal justice system by allowing an authorised police officer to administer a caution instead of starting proceedings for the offence.

There has not been so far any statutory sanction for cautioning rather than charging minor offenders, whether juvenile or adult. There has, however, been in existence for some time a general instruction, issued by the Commissioner of Police, authorising the cautioning of young and elderly minor offenders.

It is not every technical infraction of the criminal law which warrants a public prosecution in the public interest. The criminal law has to be administered sensibly and realistically.

For myself, I would like to see the caution procedure extended by statute to cover cases where there is prima facie evidence that an adult has been guilty of a minor criminal offence but, having regard to the nature of the offence, the character of the offender and other relevant matters, no good public purpose would be served by expending public monies to launch a prosecution when the best outcome for the prosecution would be a finding of guilt but an absolute or conditional discharge with no conviction being recorded. In my experience there are more cases in this category than are generally recognised. Having said that, I accept without qualification that the discretion to charge or not to charge for a trivial or minor infraction of the criminal law at police level has to be exercised with great care and under strict controls.

I would like to see established within the police service a committee of three, constituted by senior police officers of or above the rank of Superintendent, to consider whether a minor or trivial case referred to them by the officer responsible for the investigation of the offence be prosecuted or whether a caution would suffice. I am confident that if this idea were adopted, with proper controls, the Magistrates Court and the District Court would be relieved of some of their already heavy criminal workload and, at the same time, the interests of justice would not suffer.

I come next to a rather curious heading to the topic to follow: 'Justice is not a cloistered virtue'.

There has of late been a concerted attack on the judiciary. The press have brought up the heavy artillery and bombarded the judiciary relentlessly and mercilessly. The judiciary is embattled. It hides behind a wall of reticence.

I have been a practitioner of the legal craft for 40 years, 21 as a barrister and 19 as a Judge. I hope, therefore, Mr Attorney and Minister, it will be excused if, as a man of grey hairs whom the years have rendered venerable, I venture a few words of my own on the role of the judiciary in modern times. I fully expect that the position I have assumed will be subjected to public scrutiny and even criticism. I accept that. The profession of judging is an exposed profession. It is exposed to public scrutiny and public criticism. There has to be judicial accountability.

It is the right of everyone to make fair comment, even outspoken comment, on matters of public interests. Provided those who criticise the Bench pay proper respect to the standards of fairness, accuracy, temperance and good taste, the Judges should have nothing to fear from criticism; nor should they resent it. Why is this so? The answer is simply that the reputation of the judiciary should not be so frail that their actions should be shielded from criticism. The Judges must rely on their own conduct itself to be their own vindication.

However, those who criticise the judiciary should remember that, from the very nature of their office, judges cannot generally reply to criticism. They cannot enter into public controversy or polemical debate. Lord Atkin put it very well more than 50 years ago:

> The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising the right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue and must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

In all this, the media play a powerful role. They can make public opinion. And once made, public opinion is irreversible. There are memorable instances close to home of the great power of the press in making public opinion and thus influencing events for good or for evil. 'In order to be deserving of freedom', said Lord Denning, 'the press must show itself worthy of it. A free press is a responsible press. The power of the press is great. It must not abuse its power.'

I fear, Mr Attorney and Minister, that the public perception of the judiciary is not as good as it should be, largely because of the lack of credible information about it (and this is one of the reasons, if I may depart from the text, why I have allowed, with the concurrence of the Ministers, a free press on this occasion). The judiciary is seen as a body remote, authoritarian, stuffy and austere, a body out of touch with contemporary society, its standards and its mores. If this be so, then the image of the judiciary needs softening.

How can this be done without impairing the independence of the judiciary? I think it right that Judges' voices should be heard when our juristic system is debated. Senior Judges should be prepared to state their views on general topics. I

think it can be done in an acceptable way by the heads of Courts and some senior Judges stepping down from the Bench and occasionally delivering addresses to be broadcast to a wide audience, not for the purpose, I stress, of answering particular criticisms or vindicating hard or unpopular decisions, but rather with a view to explaining to the public in clear and simple language the purpose and functions of the judiciary, how it works, what its problems are, how they may be overcome, and so forth. I see it as part of an educative process which has for too long been neglected.

I think the time has come to remove the mystique which supposedly surrounds the judiciary. The wall of reticence should be broken down. The judiciary should ask itself whether its conventional self-imposed isolation any longer accords with changed public attitudes and perceptions about it. The judiciary no longer commands uncritical respect. Whereas not all that long ago criticism of the judiciary was muted and tentative, criticism is now strident and vociferous. We should strive to correct certain misconceptions about the judiciary by making it more accessible and its aims more explicit. It is in the public interest that the justice system should be seen to be functioning satisfactorily and that it should have the confidence and respect of the vast majority of informed people.

And now to the last topic, the position of the President.

It has to be understood that before the passing of the new legislation there was a Childrens Court constituted under the *Childrens Services Act 1965*, which was presided over entirely by the Magistracy. The new legislation creates what might be described as a two-tiered system. Childrens Court Magistrates appointed under the new Childrens Court Act will function pursuant to the power vested in them under the Juvenile Justice Act.

The *Childrens Court Act 1992* provides for the appointment of one or more District Court Judges as Childrens Court Judges and the appointment of one of those Judges as President of the Childrens Court of Queensland. A Childrens Court Judge is empowered to, *inter alia*, review sentence orders made by Magistrates and to try serious offences sitting alone without a jury. There is, however, a severely limiting feature to the exercise of this jurisdiction: the child must be legally represented and consent to conferring the jurisdiction on a Childrens Court Judge. The President's statutory functions are: to ensure the orderly and expeditious exercise of the jurisdiction of the Court when constituted

by a Childrens Court Judge; to recommend to the Governor-in-Council rules of court governing procedural and related matters; to issue general practice directions; and to report to Parliament annually on the administration and operation of the Childrens Court of Queensland during the year. As well, the President should superintend the judicial functions of the Childrens Court state-wide, structure it in an orderly and acceptable way, coordinate its efforts, and lay down general principles and guidelines.

I have, Mr Attorney and Minister, no illusions at all about the task ahead. I have been handed a tough assignment – but I do not shrink from it. I was pleased, Mr Attorney, to be asked to occupy this important position and I was pleased to accept. If we treasure the blessings of the inheritance of children, if we regard the youth of the country as a national asset, then it behoves us to turn our errant young from the path of crime by punishing the wrongdoer, warning the unruly, encouraging the faint-hearted, supporting the weak and being patient to all.

I should like to say that the new, enlightened legislation should not raise public expectations too high too soon. Juvenile crime is rampant. It is no good turning a blind eye to it. It will take time to turn the tide, but I have full confidence that, if all do their duty, if nothing is neglected and if the best arrangements are made, then turn it will. As Saint Paul said:

> And let us not be weary in well-doing: for in due season we shall reap, if we faint not. (Galations 6:9)

3. Symposium Paper: Juvenile Justice

Introduction

It is an unhappy fact that criminals are getting younger and younger, and that offences committed by juveniles are becoming more and more serious. It is being said in some quarters that the existing law is proving itself incapable of dealing with rising juvenile criminality. The present law, it is argued, has allowed young offenders to commit crimes with virtual impunity, and by placing the emphasis on the treatment and care of delinquents, rather than on deterrence and punishment, has freed persistent child offenders to carry on their criminal activities.

Newspaper reports typify the current wave of anxiety surrounding juvenile crime, which, it is said, has reached epidemic proportions. It is also said that children are encouraged to become criminals and that young offenders deride the powerlessness of the courts to do anything effective. Has this 'moral panic' a basis in reality?

There is a school of thought that society needs protection against offenders who, because of the gravity of their current crimes or their criminal histories, are a serious nuisance or, worse still, dangerous. In such cases it is contended that the emphasis should be on issues central to the criminal law, notably denunciation, retribution, deterrence and incapacitation. It is wrong to close one's eyes to the political reality that certain highly visible, serious offences evoke community outrage or fear which only punitive sanction can mollify. There are some crimes which, of their nature, are so serious, and so shocking to the conscience of the community, that anything short of a custodial disposition would do nothing to assuage community concerns. It is only realistic to recognise that society desires to place in long-term custody certain categories of young offenders whom it regards as dangerous.

Happily, most juvenile crime is not serious, not repetitive and not predictive of future criminal careers, but it has to be faced that there is nevertheless a significant volume of serious and repetitive juvenile criminality.

It is difficult to devise a system which will meet the needs of society for protection from criminous children and the needs of many of those children to achieve decent and contributing lives. It is not always easy to reconcile the idea of benevolence and the realism of social protection when dealing with juvenile

crime. Inherent in any juvenile justice system are conflicting aims – to deter and restrain, to excuse and to understand, to punish and to help.

Reforms have sometimes reflected no more than a desire to try something different. Often the impetus has been disenchantment with the old, rather than researched findings that the new will be more effective. Unless all innovations are carefully evaluated, the haphazard patterns of the past will be repeated and the tendency to assume that good intentions have expressed themselves in significant progress will persist. Experience teaches the need for scepticism, and it is clear there are no simple answers to the problems of juvenile offending.

At all times new views on juvenile justice are presented as an improvement on the present state of affairs, as evidence that some progress is being made, that previous failures are being corrected.

There is an element of naivete in all this debate – a failure to recognise that there is nothing intrinsically radical or reactionary about punitive or rehabilitative models of juvenile justice. Both are open to serious abuse, to violations of basic rights and of natural justice. Such abuses may well be minimised or ignored for long periods of time if there is an ideological blanket under which they may be concealed.

As Ellen Ryerson, the author of *The Best Laid Plans*, so perspicaciously stated:

> All the changes in the juvenile court which have already occurred, and virtually all those which may occur, confess directly or indirectly the belief that we do not know what to do about juvenile crime, and a fear that collectively we can do nothing. This seems true even of the demands for harder sanctions: they represent more a desire to find symbols of community outrage than to advocate a strategy with any promise of success. The sense of helplessness in the face of juvenile crime is one sign among many that the promises of modern society are not being kept. Neither experience nor theory has been kind to assumptions of the innocence of childhood, the malleability of human behaviour, the competence of science or the efficiency or benevolence of the State. These assumptions left us exposed to serious disappointments. From this position of exposure, due process thinking and more modest ambitions may help us stage a not too undignified retreat. We need not be too gloomy about the retreat.

The procedures developed over 200 years have been marked by recurrent doubts and reassessments. The shifts in emphasis from time to time have reflected the current political climate. Nevertheless, as society evolves, there is a need periodically to refashion the law and practice of the juvenile justice system to meet the serious and continuing challenges of youth crime, juvenile delinquency and child neglect.

One must look therefore at the philosophy behind the current Queensland legislation and examine what the proponents of the 1992 Juvenile Justice Act intended to achieve.

Juvenile Justice Act

The legislation

The Childrens Court Act and its companion Act, the Juvenile Justice Act, were enacted in August 1992. They were proclaimed on 1 September 1993.

Because the law, and the practice and procedures, in relation to the administration of juvenile justice had become outmoded and in many respects inadequate to deal with the current disturbingly high level of juvenile crime, the whole system of juvenile criminal justice has been overhauled. The outcome of this overhaul has been the enactment of two significant pieces of legislation: the *Childrens Court Act 1992* and its companion, the *Juvenile Justice Act 1992*.

A child is defined as a person who has not turned 17 years. However, the Juvenile Justice Act contemplates increasing the age, by regulation, to include a person who has not turned 18 years.

This comprehensive legislation contains commendable measures to combat juvenile crime. This is not the time to embark on a detailed consideration of the provisions of the Acts. However, it may be said in general terms that the legislation is an earnest endeavour to establish a code for dealing with children who have crossed the line dividing errant behaviour deserving admonishment from criminal conduct calling for the imposition of the sanctions of the criminal law. For good and proper reasons the underlying ethos of the new legislation places emphasis on the rehabilitation of offending children and their reintegration into society.

The explanatory note to the Juvenile Justice Act admirably encapsulates the central concept of the legislation: it is to encourage offending children to accept responsibility for their behaviour and at the same time to give them the opportunity to develop in responsible, beneficial and socially acceptable ways with due regard to family values.

However, for serious offenders, and repeat and intractable offenders, the power of detention for significant periods exists. The power of detention is, however, to be used as a last resort.

A 'serious offence' is defined as an offence which attracts life imprisonment or an offence which, if committed by an adult, attracts fourteen years or more imprisonment. Comprehended by serious offences, therefore, are such offences as murder, robbery, rape and housebreaking.

A Childrens Court Judge has power to detain a child for up to 14 years for a life offence, and up to 7 years for a serious offence other than a life offence.

The sentencing options generally have been sensibly expanded to allow Childrens Court Magistrates and Judges a wide range of sentencing discretions, including probation and community service, and a compensation order against a parent whose wilful failure to ensure proper care of, and supervision over, a child, has substantially contributed to the child's offence.

Children who are sentenced to detention are to be held in a detention centre established under the Act. The Chief Executive Officer has the responsibility for establishing programs and services designed to rehabilitate and educate the child so that on his release he will be integrated into the community and become a useful, law-abiding member of it.

I should like to say right at the beginning that the quality of the staffing of detention centres and the educational and other programs undertaken by detainees will be of vital importance in the rehabilitation of offenders and therefore the long-term success of the endeavour. The whole idea of detention centres is to segregate young offenders from adult prisoners – some of them old lags – held in conventional prisons. I am hopeful that the detention centres will prove to be places of learning and enlightenment, and, we must hope, discipline. No-one wants a return to Dickens's time, when workhouses were places of dark inhumanity. I should let it be known that I intend to make periodic visits to the centres to inform myself of their standards and utility.

Sentencing

If there is one topic of equal concern to lawyer and layman alike, it is the high level of crime – especially juvenile crime – and how to deal with it.

The Juvenile Justice Act prescribes sentencing principles for juveniles. The emphasis throughout is on rehabilitation and re-integration into the community. A custodial sentence – in the Act called a detention order – is an option of last resort.

What should be the aims of sentencing? They should be to treat, reform or rehabilitate the offender, to compensate the victim, to punish, to deter, and to protect the public. Not all these aims can be achieved by any given sentence. For example, if a custodial sentence is warranted, it would be illusory, in most cases, to combine it with a compensation order compensating the victim of the crime.

So far as juvenile offenders are concerned, a sentence of detention will be reserved for those guilty of serious crimes, and for those repeat, incorrigible and intractable offenders who have proved to be impervious to community-service orders and who treat the Courts with defiance and contempt.

If a young offender has been given the benefit and assistance of probation, has been conditionally discharged, and has been given a community-service order, what is the Court to do if he comes back again, and again, and again! Short of repeating the same threats and wagging the same finger once more, there must surely be a custodial sanction available.

There has been, of late, a spate of much-publicised offending by youngsters. I need only name two types of prevalent offences: housebreaking and car-stealing. And regrettably there have been instances of sensationally violent offences committed by the very young – at times against the very elderly.

The Courts see the end result of criminal activity – the committed crime – and must deal with it as best they can. The causes of juvenile crime are varied and complex. There are often socioeconomic factors involved. This is not a suitable occasion to speak on that subject in any detail.

And it must be remembered that the Courts cannot make people good or more responsible to one another. The Courts are only one of a number of social influences. We happen to be going through a period when selfish crime is on the

ascendant. We must hope it will pass, that the social influences of home and education, and the removal of the curse of high unemployment, especially as it impacts on the young, will improve the moral climate. There is no doubt in my mind that there is a definite correlation between pervasive unemployment and crime.

Cautioning

There is another procedure covered by the legislation to which I give my unqualified endorsement. I refer to the cautioning provisions of the Juvenile Justice Act.

In appropriate circumstances, especially where the alleged offence is trivial and the child has no history of offending, a caution would suffice. The power to caution is restricted to an experienced officer authorised by the Commissioner of Police. The purpose of a caution is to divert a child who commits a minor offence from the Courts' criminal justice system by allowing an authorised police officer to administer a caution instead of starting proceedings for the offence.

Before the advent of the Juvenile Justice Act there had not been any statutory sanction for cautioning rather than charging minor offenders – whether juvenile or adult. There had, however, been in existence for some time a general instruction issued by the Commissioner of Police authorising the cautioning of young and elderly minor offenders.

It is not every technical infraction of the criminal law which warrants a public prosecution in the public interest. The criminal law has to be administered sensibly and realistically.

The position of the President

Before the passing of the new legislation there was a Children's Court constituted under the *Children's Services Act 1965*, which was presided over entirely by the magistracy. The new legislation creates what might be described as a two-tiered system. Childrens Court Magistrates appointed under the new Childrens Court Act will function pursuant to the power vested in them under the Juvenile Justice Act.

The *Childrens Court Act 1992* provides for the appointment of one or more District Court Judges as Childrens Court Judges, and the appointment of one of those Judges as President of the Childrens Court of Queensland. A Childrens Court Judge is empowered to, *inter alia*, review sentence orders made by Magistrates and to try serious offences sitting alone without a jury. There is, however, a severely limiting feature to the exercise of this jurisdiction: the child must be legally represented and consent to conferring the jurisdiction on a Childrens Court Judge. The President's statutory functions are: to ensure the orderly and expeditious exercise of the jurisdiction of the Court when constituted by a Childrens Court Judge; to recommend to the Governor-in-Council Rules of Court governing procedural and related matters; to issue general practice directions; and to report to Parliament annually on the administration and operation of the Childrens Court of Queensland during the year. As well, the President should superintend the judicial functions of the Childrens Court state-wide, structure it in an orderly and acceptable way, coordinate its efforts, and lay down general principles and guidelines.

I should say that the new enlightened legislation should not raise public expectations too high too soon. Juvenile crime is rampant. It will take time to turn the tide, but I have full confidence that, if all do their duty, if nothing is neglected and if the best arrangements are made, then turn it will. As Saint Paul said:

> And let us not be weary in well doing: for in due season we shall reap, if we faint not. (Galations 6:9).

Age of Criminal Responsibility

From the experience of the ages have evolved special rules for child criminal conduct. Of particular relevance is the age of criminal responsibility. The law in its wisdom has determined that there is an irrebuttable presumption that children under the age of criminal responsibility (which varies from jurisdiction to jurisdiction) are incapable of committing crimes; and there is a rebuttable presumption that children over the age of criminal responsibility and under the age of 14 (15 in Queensland) are incapable of committing crimes. The age of criminal responsibility in Tasmania and Western Australia is 7, 8 in Victoria and the Australian Capital Territory, and 10 in New South Wales, South Australia, Queensland and the Northern Territory.

The age of responsibility is not the age at which the child can tell right from wrong – most five-year-olds can do that – but the point at which society feels it can publicly and unashamedly punish. There is an almost universal feeling founded on humanity and good sense that children of very tender years, no matter how shocking their behaviour, should be shielded from the rigours of the criminal law. It would, for example, be generally unacceptable to subject a five-year-old to a criminal trial and to criminal penalties. Criminal proceedings are a public demonstration of disapproval of grossly antisocial conduct, but there are many social problems for which they do not offer an appropriate solution. Serious misbehaviour of the very young, bordering on the criminal, is one of these problems.

The various ages of criminal responsibility which currently apply in the multiple jurisdictions which constitute the Australian Federation are, it can fairly be said, arbitrarily fixed. The ages do not reflect universally observable facts of child development. However, the inescapable fact is that formal criminal prosecutions are often an inappropriate and harmful response to most youthful offending. That is a view that is now widely accepted. This view has led to emphasis being placed on the diversion of children from the criminal justice system.

There is, however, an exception to this generally held view. The young offender who persistently commits serious crimes should be dealt with differently both in the interests of punishing the offender and of protecting the public from his depredations.

Presumption of incapacity

Under the common law there is a presumption that a child over the age of criminal responsibility and under 14 is incapable of committing a crime. In Queensland the presumption of incapacity applies to children under the age of 15: see s. 29 of the Criminal Code. This presumption can be rebutted if the prosecution proves that the child knew that the act was wrong. The evidence which the prosecution must present in order to rebut the presumption is of a different kind from that needed to establish any mental element which is an ingredient of the offence charged. It is conceivable that a child who commits a crime may intend the act constituting the crime and yet not realise that what he was doing was wrong. In order to displace the presumption of criminal incapacity

where a child is aged between 10 and 15, the prosecution must prove not only the ordinary elements of the offence charged, but also that the child knew that what he was doing was wrong and not merely naughty or mischievous. In other words, the prosecution must prove that the child was aware of the wrongness of the act. The knowledge which must be established to rebut the presumption is knowledge of wrongness and not knowledge of illegality. Some formulations of the rule suggest that the prosecution must go beyond proving that the child knew that the act was wrong; it must prove that there existed knowledge of 'grave' or 'serious' wrongdoing: see *R v. M* (1977) 16 SASR 589 at 593; *R v. Gorrie* (1918) 83 JP 136; *McC v. Runeckles* [1984] Crim.LR 499.

The rule relating to the criminal responsibility of children under 15 has been strongly criticised. In *R v. M* (supra) Bray CJ observed:

> I think it is hard to regard this ancient rule about the capacity of a child...as altogether satisfactory or suited to modern conditions.

In 1960 the English Ingleby Committee recommended that the rule should be abolished. The test applied, known as the *doli capax* ('knowledge of wrongdoing') test, can be traced to the 14th century. The test was developed when children suffered savage penalties. Is it necessary in an age when their welfare is a guiding principle? Glanville Williams takes the view that '"the knowledge of wrong" test stands in the way not of punishment but of educational treatment. It saves the child not from prison, transportation, or the gallows, but from the probation officer, the foster-parent or the approved school.' (Glanville Williams, *Criminal Law: The General Part*, 2nd ed., Stevens, London, 1961, p. 815).

One English authority on juvenile justice, P. Priestly, has suggested in *Justice for Juveniles* that the age of criminal responsibility should be raised from 10 to 15. Children below that age who commit offences should be dealt with in the main informally or by formal police caution. But if the offences of such a child constitute a serious threat to the safety or well-being of other people, then a special kind of 'public protection proceeding' should be introduced into the juvenile justice system. The proceeding should be instituted in a higher court. The aim of such a proceeding would be to secure the detention of the child, not necessarily in his own interest, but in the interest of the public. The protective custody order would commit the child to an approved detention centre for a definite period, subject to three-monthly reviews.

Superficially attractive as this theory may seem, I doubt whether it would be politically or popularly acceptable for the age of criminal responsibility to be raised to 15 years. Children know the difference between right and wrong at a very young age, and although the current age of criminal responsibility (10) has been arbitrarily chosen, it represents an age at which it is generally felt that legal accountability can be imposed.

The tragic and horrific James Bulger murder trial has provoked comment on several fronts. It is timely to reflect on the legal implications of the trial. The image of the innocence of childhood has been shattered. Scores of children may die tragically in a school omnibus outing, hundreds in senseless wars – the most recent in Bosnia – thousands from famine in Ethiopia, but the killing of James Bulger has induced a mood of self-questioning far in excess of these other horrors. As Dr Habgood, Archbishop of York, recently reportedly said:

> There is a line between fantasy and reality...The shock of the Bulger case is a revelation of how far the line has been crossed. It is important not to exaggerate. Robert Thompson and Jon Venables are, thank God, rare exceptions. But to discover that the line can be crossed by children so young and with such devastating consequences should raise urgent questions about the kind of diet on which their imaginations have been fed...The lessons to be drawn from this tragic case are about the influences the adult world brings to bear on its children. It is therefore a proper focus for national self-questioning...If the adult world corrupts its imagination, the children will not be far behind...The importance of the crime lies in what it says about the potential for evil in children of an age at which innocence was once taken for granted. That potential has been fed by the adult environment in which many children grow up. If the whole sad story can lead to a greater awareness of the extent to which the so-called 'adult' world has entertained evil, played with it, lusted over it, and indulged in it, then James Bulger may not have died in vain.

Dr Habgood's wise and eloquent words give much food for thought. The leaders of our society – whether political, religious or judicial – should exert whatever moral influence they have by virtue of their positions to warn against and, if possible, prevent the cynical exploitation of violence, horror, lust and degradation. Our moral leaders must strive for a restoration of ordinary goodness.

The conduct of the Bulger trial and the indeterminate sentence imposed on the offending children have been the subject of some critical comments. Michael Freeman, Professor of Law at University College London, questioned whether the imposing setting of a formal court and trial by jury were appropriate for children so young. (They were aged 11.) Professor Freeman said:

> A number of values are in conflict. The court setting offers security and projects an image of gravity – but would the truth emerge more easily with fuller participation, in a less formal setting such as, for example, a school or a church hall? And what of trial by jury? A jury of adults can hardly be the peers of 11-year- olds.

Shocking though it is, it cannot be denied that there is an hysterical element about the Bulger case. After the trial, the parents of Jamie Bulger started a national petition to send to the Government insisting that the killers be kept in custody for the rest of their lives. Extremists who had wanted them hanged hoped that the law would throw away the keys and keep them inside forever. It now transpires that the trial judge, Mr Justice Morland, has advised the Home Secretary that 8 to 10 years detention would be sufficient. It has also been leaked that the Lord Chief Justice, Lord Taylor, has separately recommended that the boys should be detained for not less than 10 years.

It is interesting to note that, in most countries constituting the European Community, boys of the age of Thompson and Venables would not have stood trial for murder. The children, instead of being tried and punished, would probably have been placed in an institution and treated for their crime against society.

This brings us back to what should be the age of criminal responsibility. Is 10 too young? If 10 is too young, what should be the age? Were Thompson and Venables too young to know that what they were doing was wrong? Having regard to the grotesque particulars of the crime, I think not. What are the particulars? They lured Jamie, a toddler of 2, from a shopping mall, tortured and beat him, knocked him unconscious and then left his body to be cut in two on a railway line. I think the facts speak for themselves. It is clear from the jury's verdict of guilty that they had no difficulty in deciding that the boys, young though they were, knew of the wrongness of their acts.

Under the Juvenile Justice Act, the maximum period of detention which can be imposed on a child guilty of murder is 14 years, of which 30 per cent is

automatically remitted. I have no doubt that in this touchy area, where, understandably, emotions can run high, it is preferable to impose a determinate sentence on a child guilty of a serious crime. The Queensland law in that regard is therefore both sensible and humane.

The Efficacy of Imprisonment (Detention)

At the Conservative Party conference in England in October 1993, the Home Secretary, Mr Howard, announced that the Government would respond to popular demand by taking a harder line on crime – both adult and juvenile – and by stressing the value of imprisonment and detention as opposed to non-custodial sentences.

The Government was reflecting a view commonly held that custodial sentences offer the only protection from persistent offenders. Removing persistent offenders from the scene must, at least for the duration, prevent them from continuing their antisocial behaviour. A terrorised local community would find it hard to understand why some respite from persistent bad offenders, such as car thieves and burglars, should be denied them. Whilst it is true that the ideal criminal justice system does not necessarily place emphasis on punishing the offender but rather on protecting the innocent and imposing proper standards of right and wrong, it is self-deluding to turn a blind eye to the real world where serious crime goes on unabated. Putting persistent offenders away solely or predominantly to protect society is the utilitarian approach to punishment. It is the only practical immediate solution.

Lord Woolf, a respected Law Lord, recently stirred a veritable hornets' nest when he said that the Government's initiatives were, in effect, pandering to the baser instincts of populist sentiment, which he believes to be ignorant of the nature of criminality. By taking the Government on, as it were, Lord Woolf has invigorated debate about crime and punishment. His thesis is that prison sentences should be reserved for the worst cases and that, where imprisonment is imposed, terms should come down rather than go up. He suggested that it should be a fundamental rule of sentencing that you only send someone to prison if there is no appropriate alternative and then impose the shortest justifiable sentence. He said:

> People feel vulnerable and in need of protection. Some of the victims of crime have, not without justification, suggested that too little attention is being paid to what they have suffered and too much attention is being paid to the interests of those who were responsible for what happened to them.
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> I understand and sympathise with those complaints. It is important, however, that we do not overreact and, instead of making the situation better, make it worse. Above all, it would be a terrible mistake to squander resources on short-term palliatives, window-dressing, which instead of making the position better would make it worse. Under the present prison regime, prison is an expensive way of making 'bad people worse'.

Lord Woolf lays emphasis on tackling the causes of crime and spending some of the money that is spent on prisoners on crime-prevention programs. It costs £22,000 a year to keep a prisoner in any English prison.

It is true, as Lord Woolf said, that the prison service has to live with prisoners during their time in prison; the rest of the country lives with them afterwards. It is important that money be spent on prison rehabilitative programs. The aim must be to reduce the likelihood of prisoners re-offending after their release. There is no point in locking them up and forgetting about them.

Lord Woolf's thinking is in line with some modern penologists. Mitigation of punishment as such is not the new penology's aim. The thing that adherents of this school are trying to do is to substitute constructive efforts for the purely negative and destructive effects of customary punishments. The old system of imprisonment, the new penology says, has proven itself to have one serious drawback – it doesn't work.

There is a 'wave of anxiety' which the public at present feels about crime – and especially juvenile crime. Youngsters who appear to be cocking a snook at society, who apparently do not give a damn about their offending, are a real problem. If a child is detained in a detention centre for a prescribed period, he is out of harm's way for the time being and cannot commit crimes against society. However, detention will not work if, when he comes out, he is more likely to commit further offences than before he went in. The longer he spends out of society the more difficult it is for his reintroduction into society to be achieved.

There are times, however, when persistent and incorrigible youthful offenders have to be detained in the interest of public protection.

Experience to the present time demonstrates that, with few exceptions, prisons and young offenders' institutions do not have positive rehabilitative value. But they serve a useful social function. The persistent offenders cannot commit crimes while they are there. Sir Frederick Lawton, a former Lord Justice of Appeal, is on record as saying that exhortations to the judiciary to pass shorter sentences have been misconceived in relation to persistent offenders, but not to those coming before the courts for the first time. Sir Frederick believes that sentencing practices for these two categories of offenders should differ. He goes on to say:

> The courts have known for many years that about 80 per cent of those appearing for the first time never do so again. It does not seem to matter whether on that occasion they are given a custodial sentence or not. However, 20 per cent will come back time and time again...The question for Judges and Magistrates sentencing someone on a first appearance is this: as the chances are 4 to 1 that the offender will never come back, is there any point in imposing a custodial sentence unless not to do so would be an affront to justice having regard to the seriousness of the offence (for example, rape or armed robbery)?
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> If the court does impose a custodial sentence on someone who, but for it, would be among the 80 per cent, there is the danger that the corrupting environment of a penal institution will turn him into a persistent offender. It follows that the courts should not, despite what the Home Secretary has said, change their sentencing practices when dealing with those convicted for the first time.
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> Mistakes in sentencing first offenders leniently are bound to be made; but overall it is probably in the public interest that they should be. Sometimes they can be remedied when the offender has to be sentenced on a second conviction...The Home Secretary is justified in thinking that imposing one lenient sentence after another on the same offender is not in the public interest. He is mistaken in believing that custodial sentences serve any useful purpose beyond containment. (*Gazette* 90/39, 28 October 1993)

No-one would doubt, I should think, that there is need for a long-term crime strategy to be developed which would have as its core aim the prevention of crime, with emphasis on the rehabilitation of prisoners. To achieve tangible results in these areas, governments must be willing to provide the necessary resources – financial and physical. Governments should be thinking in terms of

immediate and long-term solutions. Immediate solutions require ways and means of coping with the present volume of crime – and that means, *inter alia*, money being spent on more prisons. Long-term solutions require expenditure on crime prevention, which means more police officers. It also means more money for rehabilitative schemes within the prisons system.

Attributes of Childrens Court Magistrates and Judges

It has been said that the effectiveness of the juvenile justice system is dependent in large measure on the calibre of the Magistrates and Judges serving on juvenile courts. According to the United States Standards for the Administration of Juvenile Justice (1975–1978), a list of personal attributes a juvenile court Magistrate or Judge should possess is:

1. deep concern about the rights of people;
2. interest in the problems of children and families;
3. awareness of modern psychiatry, psychology and social work;
4. ability to make dispositions uninfluenced by personal concepts of child-care;
5. skill in administration and ability to delegate;
6. ability to conduct hearings in a kindly manner and talk to children and adults at their level of understanding without loss of the essential dignity of the court; and
7. eagerness to learn.

Another authority has said that Magistrates and Judges must have something more than knowledge of the law and the world. They must have that touch of sympathy and enthusiasm for their work, without which any attempt to deal with children is useless. They must be endowed in no ordinary degree with the larger and better attributes of human nature and those qualities which experience will best cultivate. It is therefore desirable that all cases dealing with children should come before one Judge so that he or she may gain those valuable qualities which experience alone can give.

There is no doubt that the task of a juvenile court Judge is a demanding one. It can, at times, prove morally elevating and at other times emotionally draining. It requires judicial administrative skills, knowledge of psychological, sociological and emotional problems affecting children and their parents, and an ability to wisely determine the most suitable means by which a delinquent can be rehabilitated. These skills and abilities must be learnt through education, training and experience.

The ideal juvenile Court Judge is perhaps one who combines a willingness to display leniency with an ability to recognise cases where strong corrective measures are indispensable.

For myself, I would say that the most important quality which a juvenile Court Judge must possess is a wise and understanding heart. You will all recall the biblical story about King Solomon. God said to Solomon:

> 'Ask what I shall give thee.'
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> Solomon replied:
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> 'Give thy servant an understanding heart to judge thy people, that I may discern good and bad.'
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> And God said:
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> 'Because thou hast asked for thyself understanding to discern justice, behold I have done according to thy words: lo, I have given thee a wise and understanding heart.'

There are at least three fundamental responsibilities of a juvenile court Judge:

1. to protect the community;
2. to act in the best interests of the welfare of the child; and
3. to uphold the dignity of the law and public faith in the judicial system.

In my opinion, a juvenile court Judge should make periodic on-site visits to detention centres and other facilities serving juveniles. It is my strong belief that only by inspecting juvenile facilities and programs for themselves can juvenile court Judges understand the impact of detention and other judicial dispositions upon an offender.

Juvenile Delinquency

Juvenile delinquency has no single cause, manifestation or cure. Its origins are many and the range of behaviour it covers is equally wide. A child's behaviour is influenced by genetic, emotional and intellectual factors, his maturity and his family, as well as his school, neighbourhood and the wider social circle in which he moves. Such behaviour can be a response to unsatisfactory family or social circumstances, a result of boredom brought about by idleness or unemployment, an indication of maladjustment or immaturity, or a symptom of a deviant, damaged or abnormal personality.

Poverty, suffering and abuse are often factors productive of juvenile delinquency. In many instances, offending is a direct or indirect result of misery, oppression in the home and the lack of a legitimate source of income or accommodation outside the home. Offending is an inevitable consequence of being forced to live off the street.

The vast majority of delinquents, especially those not detected, emerge from delinquency into responsible adulthood. Fortunately, in most communities there exist a number of screening agencies for delinquents: family, school, social services and the police. In some jurisdictions, children are referred to a juvenile court only when these agencies have failed to achieve the resolution of the problem.

The police can be a powerful screening agent. The police in most jurisdictions have a discretion not to prosecute. It can be exercised informally on the street but, because no official record is kept of informal cautions, it is impossible to assess the extent to which this occurs. The police could also traditionally give a formal warning or caution as an alternative to prosecution. Informal and formal warnings, however, are generally appropriate only in cases of minor or trivial infringements of the criminal law.

Most police areas in England have juvenile bureaux which decide whether or not to refer particular children to the juvenile courts. Once a child comes to the notice of the police and it is established on the face of it that he has committed an offence, the police officer in the case submits to the bureau a report setting out the facts of the offence. Bureau staff then collect information about the child from their records, from the Family Services Department, from the school and

from any other relevant agencies, and usually visit the child's home. On the basis of this information, the Chief Inspector of the bureau decides which course of action is the most suitable for the child – to prosecute, to caution, or to take no action.

The new *Young Offenders Act 1993* of South Australia has instituted a system of family conferences. A family conference is presided over by a youth justice coordinator. The conference is attended by the youth, members of his family, a police officer and such other persons invited to attend. Decisions as to the disposition of the matter are by consensus, which must include the youth and the police officer. The powers of a family conference are (a) to caution, (b) to compensate the victim, (c) to have the youth perform up to 300 hours community service and (d) to tender an apology to the victim. None of these powers can be exercised unless the youth gives an undertaking to honour the terms of the decision reached at the conference. Failure to honour the decision empowers the police officer to lay a charge before the court for the offence in relation to which the conference was convened.

In introducing the legislation in the South Australian Parliament, the Attorney-General, Mr Griffen, said that family were an integral part of the new scheme for all but the most serious cases. He said the system was based on the New Zealand model that puts pressure on young offenders to face the consequences of their actions, and enables offences to be dealt with quickly. The conference brings the offender and his or her parents face to face with a police officer, a youth justice coordinator and, where appropriate, the victim to discuss the offence and remedial options.

Probation and Community Service

It has been argued by the child-savers school of thought that Childrens Courts justify their existence, not so much as courts of law but as the recognised agency for dealing with the child rather than the offence committed. The court then expresses this value to the State in the proportion of children it can successfully release on probation. The attainment of the child-savers' objectives depends on the work of the probation officers. Probation has been regarded as one of the foundation stones on which Childrens Courts were built. It is a farce to order probation unless there is an efficient system of probation.

Probation should not be seen as a paper order which lacks teeth. The order is intended to ensure that the child for whose benefit the order was made receives appropriate counselling and supervision for the period of the order. The ultimate sanction for disobedience to the terms of the order – and especially for reoffending during the probation period – is, in the case of a child, detention or, in the case of an adult, imprisonment.

The importance of probation in the overall scheme of juvenile justice cannot be overestimated. It is from this form of dealing with delinquent children that the remedial effects are especially looked for, and the measure of success will be found in the manner in which the probation officers are able to apply themselves to their charges. It is no exaggeration to say that the most important person in the juvenile justice system is the probation officer. In large measure, Childrens Courts must place their faith in probation.

Community service is also a beneficial form of order. I incline to the view that, where detention is avoidable, very often a combination of probation and community service is the most desirable disposition of the case. Community service enables the child to return something to the community which he has offended by his criminal conduct. As well, community work gives children the framework in which to learn civic virtue and responsibility.

Morality is taught by being lived. It is learnt by doing. In my opinion, community work is more powerful than moral instruction.

Detention

The avoidance of detention, wherever possible, is a manifestation of society's greater tolerance of the misbehaviour of children. Alternatives, such as probation and community service, can be justified in many instances not only as expressions of a policy of lenience or benevolence in mitigating the impact of the law on the young, but also as methods of helping the offenders by bringing good influences to bear; these alternatives are embodied in the rehabilitative ideal. The alternatives can also be justified on the ground that they remove children from the degrading and corrupting environment of prisons and some (not all) detention centres, where persistent and incorrigible young offenders are kept. It is generally believed that sending juvenile offenders to detention centres, instead of

having a reformatory effect, only brings them into association with persons with bad criminal histories and makes them worse than they were before.

Mary Carpenter, a 19th-century reformer, had this to say about turning young offenders into confirmed convicts:

> They begin as neglected children. They have no true home influence. They learn in the streets all that ought to be removed from the knowledge of the young. They are sent to prison. They come out more daring and qualified, by their having thus graduated in crime, to become the companions of more precocious thieves. One short imprisonment follows after another until the character given of him at his trial obtains for him the final stamp of a convict. (M. Carpenter, *Our Convicts*, vol. 1, p. 58)

The 6th United Nations Congress on the Prevention of Crime and Treatment of Offenders 1980 stated:

> Juvenile offenders should not be incarcerated in a correctional institution unless adjudicated of a serious act involving, above all, violence against another person or of persistence in committing other serious offences; moreover, no such incarceration should occur unless it is necessary for their protection or unless there is no other response that will protect the public safety or satisfy the ends of justice and provide the juvenile with the opportunity to exercise self control.

The new Queensland legislation imposes constraints on detention. Detention can only be ordered after exhausting all other sentencing possibilities. In other words, it is to be imposed as a last resort. The legislation puts a brake on the Court's power to order immediate detention by insisting that the Court request a pre-sentence report as a condition precedent to the exercise of the power of detention. This enforced delay in the sentencing process goes some way towards preventing hasty decision-making and gives time for reflection and mature consideration of the case.

Together with separate hearings and the probation service, special detention facilities for children are a basic feature of the Juvenile Court organisation. In the absence of proper arrangements for detention, the purpose of detention, which is not only to restrain, but to teach, to inculcate good values and to discipline, will be defeated.

Youth – A Mitigating Factor

It was not until the late-19th century that youth was regarded as a significant mitigating factor in sentencing. But as Sir Matthew Hale, the eminent English jurist, so acutely observed over 300 years ago in relation to sentencing a child guilty of a crime:

> It is prudence in such a case even after conviction to respite judgment.

By the end of the 19th century an influential school of thought emerged which stressed the need to employ preventive and corrective measures rather than punitive ones. The emphasis was on rescuing or reclaiming delinquent children by treating rather than punishing them for their wrongdoing.

The twin themes of reclamation and protection of society were brought together in the report of the 1872 Victorian Royal Commission into juvenile delinquency:

> It is needless...to dwell long upon the acknowledged expediency of endeavouring to rescue or reform children who through the death, destitution or depravity of their parents are constantly cast adrift from society...It is admittedly in the interest of society that the State should take charge of those children, in loco parentis, the only alternative being to allow them to grow up as paupers and criminals, a source of incalculable danger and expense.

The chief sentencing principles to which the court must have regard are:

1. the nature and seriousness of the offence;
2. the child's previous offending history; and
3. the impact of the offence on the victim.

Special sentencing considerations are that the child's age is a mitigating factor in determining whether or not to impose a penalty and the nature of the penalty imposed, and that rehabilitation and reintegration into the community are preferred aims.

The Influence of the Media

The media has a profound effect on our society. Juveniles are in the stage of emotional and intellectual development that makes them very susceptible to its influence. This vulnerability can be put to good advantage, however, if the public media use their influence to develop positive role models for emulation.

Despite the negative effects which the media can have on juveniles in unrestrainedly portraying acts of gratuitous violence, horror, lust and degradation, the same media can be a positive and powerful tool in preventing juvenile delinquency. Television, radio and the print media which portray positive, meaningful messages can be as effective an education tool as the traditional schoolroom or parental lecture.

Influence of School

The school is second only to parents in influencing a child's character and personality and in preparing him for useful and gainful employment in adulthood. A child's early formative years are most times determinative of what sort of adolescent he will become. There must be relevance between what a child is taught and how he lives, and his character and personality development.

Crime – Collective Responsibility

Crime prevention does not lie with law-enforcement agencies alone, nor are law-enforcement agencies alone all that effective. A concerted effort by the community, law-enforcement and social-service agencies, and the school system is necessary to combat juvenile crime. Without community involvement, responsibility for combating juvenile delinquency is left to impersonal public agencies which are too large and often too removed to be responsive to specific neighbourhood needs. Because of their organisation, these public agencies cannot be as effective in a preventive role as the local community can.

In recent times we have seen the introduction of Neighbourhood Watch systems, in which responsible people in a particular neighbourhood with good liaison with local police keep a watchful eye on criminal conduct with a view to preventing it, if possible, or, failing prevention, to ensuring early detection and reporting of crime so that prompt police or other action can be taken.

It has been suggested that the lenient treatment of offending children reflects a desire to assuage humanity's shared sense of guilt for permitting juvenile delinquency to happen. It is this notion of distributive guilt, or society's collective responsibility for individual wrongdoing, that permeates Sigmund Freud's *Civilisation and Its Discontents*. The notion is not new; it occurs in the

classical literature of the Christian era. An example can be found in *The Prophet*, by Khalil Gibran. Gibran uses this beautiful metaphorical language to express the thought:

> And as a single leaf turns not yellow but with the silent knowledge of the whole tree
>
> So the wrongdoer cannot do wrong without the hidden will of you all...
>
> And when one of you falls down he falls for those behind him, a caution against the stumbling stone.
>
> Ay, and he falls for those ahead of him, who, though faster and surer of foot, yet removed not the stumbling stone.

Lord Denning has expressed the same idea in these eloquent words:

> In any discussion of punishment it is important to recognise, as Christianity does, that society itself is responsible for the conditions which make criminals...The child who has lost his sense of security feels that he must fight for his interests in a hostile world. He becomes anti-social and finally criminal. The broken home from which he comes is only too often a reflection of society itself, a society which has failed to maintain its standards of morality. When we try to reform a criminal we are only treating the symptoms of the disease. We are not tackling the cause of it...Nevertheless, although society is largely responsible, neither religion nor the law excuses the criminal himself. Christianity has always stressed the responsibility of each individual for his own wrong doing. (*Lord Denning – A Life*, Iris Freeman, p. 214).

Much the same idea, though in a different context, is manifest in the ancient custom of tolling the chapel bell of Lincoln's Inn (a barristers' inn) at 12.30 p.m. when a Bencher has died; and many a barrister has then sent his clerk to find out who it is who has been gathered to his fathers. Dr John Donne, the eminent poet and divine, preacher of Lincoln's Inn, wrote these famous words about the bonds that link us all together:

> No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or thy own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.

The moral to be drawn from these moving words is that individual wrongdoing, like death, diminishes all humankind.

4. Right of Election

The legislation makes a twofold classification of indictable offences: serious offences and indictable offences other than serious offences. A serious offence means a life offence (e.g. murder, robbery or rape), or an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for 14 years or more (e.g. housebreaking).

Serious Offences

The procedure for dealing with a serious offence is set out in Division 2 of Part 4 of the Juvenile Justice Act (ss. 68–75). A child charged with a serious offence cannot be committed for trial or sentence unless a Childrens Court Magistrate is satisfied, after a committal proceeding has been conducted, that the child has a case to answer. At this point the child, if legally represented, has the right to elect to be committed for trial before a Childrens Court Judge sitting without a jury or, if the child pleads guilty at committal, to be committed for sentence before a Childrens Court Judge; or he may elect to be committed for trial or sentence, as the case may require, before a court of competent jurisdiction (i.e. the Supreme Court or the District Court, depending on the nature of the charge).

If the child is not legally represented, the Magistrate must commit the child for trial before a Court of competent jurisdiction.

Non-Serious Indictable Offences

In a proceeding before a Childrens Court Magistrate in which a child is charged with an indictable offence other than a serious offence and is legally represented, the child may elect to have the committal proceeding discontinued and any further proceeding conducted as a hearing and determination of the charge summarily by the Court; otherwise the proceeding must continue as a committal proceeding. If the child enters a plea of guilty at the committal proceeding, he may elect to be committed for sentence before a Court of competent jurisdiction or to be sentenced by the Childrens Court Magistrate (ss. 76–79).

If the child is charged with an indictable offence other than a serious offence and is not legally represented, the Magistrate must conduct a full committal proceeding before calling on the child to elect. The child then has the same right of election as when he is legally represented.

A Childrens Court Magistrate, however, must refrain from exercising summary jurisdiction where a child elects to be dealt with summarily for a non-serious indictable offence unless he is satisfied that the charge can be adequately dealt with summarily by him. The Magistrate should refrain from dealing summarily with the non-serious indictable offence if it involves complex questions of law and/or fact.

The position with non-serious indictable offences, then, may be summarised thus: A Childrens Court Magistrate can, in the circumstances adumbrated above, exercise summary jurisdiction over a child who elects to be dealt with summarily, but may refrain from so doing in a complex case. Alternatively, the child may elect to be committed for trial or sentence, as the case may require, to a Court of competent jurisdiction, that is the Supreme Court or the District Court according to the jurisdiction of the Court to try or sentence the child for the charge on which he has been committed.

The Jurisdiction of the Childrens Court Judge

In the result, the jurisdiction of a Childrens Court Judge is restricted to trying or sentencing a child for a serious offence where there has been an election at committal to be committed for trial or sentence to a Childrens Court Judge. In all other cases where the child is committed for trial or sentence on an indictable offence (whether serious or non-serious), save when, in the case of a non-serious indictable offence, the child elects to be dealt with summarily, the jurisdiction to try or sentence is vested in either the District Court or the Supreme Court, that is to say, in a jurisdiction other than a Childrens Court Judge.

There is one notable exception to this general statement of the position. Section 127 of the Juvenile Justice Act provides:

> 127.(1) If, in a proceeding for the sentencing of a child for an offence, a Childrens Court Magistrate considers that the circumstances require the making of a sentence order –
>
> (a) beyond the jurisdiction of a Childrens Court Magistrate; but
>
> (b) within the jurisdiction of a Childrens Court Judge;
>
> the Magistrate may commit the child for sentence before a Childrens Court Judge.

(2) In relation to a committal under subsection (1), the Childrens Court Magistrate may make all orders and directions as if it were a committal following a committal proceeding.

(3) The Childrens Court Judge may exercise sentencing powers to the extent mentioned in section 120 (Sentence orders – general).

Here, it would plainly seem, Childrens Court Magistrates can refer to a Childrens Court Judge only sentences which they consider their limited sentencing powers cannot adequately deal with. The child's right of election is in such situations abrogated. The child is not asked whether he elects to be dealt with by a Childrens Court Judge. In an appropriate case the sentencing power is unilaterally transferred by the Magistrate to a Childrens Court Judge regardless of the wishes of the child. This exception to the general rule points up, I think, the anomalous position to which the right of election entrenched in the Act has given rise.

Disadvantages of the Right of Election

As President of the Childrens Court I have had great difficulty in coming to terms with the right of election. The philosophic basis for making it a significant feature of the legislation appears to be to give the child freedom of choice. But if that be the rationale for the right of election then, in my opinion, it is, while noble in concept, misguided in practice. If it is a policy decision to set up a new Court with new powers to deal with serious juvenile crime, then that Court to properly fulfil its charter should deal in fact with all serious crime, and not such portions of it as children choose to allow it to deal with.

With all due respect, there is, in my considered opinion, no point in creating a special Court and appointing special Judges to deal with serious juvenile crime if the newly created Court does not exercise exclusive jurisdiction over juvenile offenders. One might as well revert to the old system of having all juvenile offenders committed on indictable offences (whether serious or non-serious) to the District Court or the Supreme Court according to the nature of the offence; and, in that event, 31 District Court and 20 Supreme Court Judges would between them exercise jurisdiction over all juveniles committed to higher Courts on indictable offences. If the real object and the true intent of the enlightened new legislation is to devise a better means than before for dealing with juvenile

crime, then juvenile crime should be dealt with exclusively by Childrens Court Judges.

Let me give an example of how farcical the right of election can appear in practice. Under the present system it is not only theoretically, but practically, possible for a child who has elected to be committed for sentence before a Childrens Court Judge for, say, robbery to be sentenced by the Childrens Court Judge in one courtroom, and for another child also charged with robbery who has elected to be committed for sentence before a Court of competent jurisdiction, namely the District Court, to be sentenced by a District Court Judge in an adjacent courtroom on the same day. Can this be right? Does this reflect the true spirit of the legislation? I think not.

Section 5 of the Juvenile Justice Act defines terms used in the Act. 'Concurrent jurisdiction' means:

(a) in relation to a Childrens Court Judge – the jurisdiction of the Judge when constituting a District Court for a proceeding in its criminal jurisdiction; or

(b) in relation to a District Court – the jurisdiction of the Judge when constituting the Childrens Court.

The *Childrens Court Act 1992* defines a Childrens Court Judge to mean a District Court Judge appointed to the Childrens Court. The appointment of a person as a Childrens Court Judge does not affect the person's appointment as a District Court Judge or the person's powers as a District Court Judge. In appointing a District Court Judge as a Childrens Court Judge, regard must be had to the appointee's particular interest and expertise in jurisdiction over matters relating to children (s. 11). A Childrens Court Judge therefore wears two hats, which are interchangeable.

The Juvenile Justice Act was proclaimed on 1 September 1993. Because of the existence of the right of election, it was impossible to predict how this right would in practice be exercised by children committed for serious offences. I decided to treat the first six months of the life of the Act as an experimental period.

At the end of that period it became apparent that a good proportion of serious crime was going to the District Court, that is to say, children charged with serious

offences were electing to be committed to the District Court rather than to a Childrens Court Judge. This, to some extent, was understandable. It is not at all uncommon for persons charged with indictable offences (whether as adults or as children) to choose to be committed for trial before a Judge and jury, which means, of course, that the committal must be to either the District Court or the Supreme Court. Quite frequently, indeed I understand in about 80 per cent of cases, persons committed for trial by jury change their pleas close to the assignment of a trial date and the case is disposed of by the District Court or the Supreme Court as a sentence, and not as a trial. The reason why criminal litigants choose this course is to enable their legal representatives to consider the committal evidence in detail and advise whether the litigant should stand trial or change his not guilty plea to one of guilty, and plead in mitigation of sentence. This, as I say, is what frequently happens.

Now the Juvenile Justice Act does not allow for a withdrawal or a reversal of an election once made at committal stage, with two exceptions. First, if the child elects to be committed for trial by a Childrens Court Judge sitting alone without a jury (i.e. if he elects to waive his right of trial by Judge and jury), he may withdraw his election to be tried before a Childrens Court Judge without a jury at any time before arraignment (i.e. before the commencement of the trial). In that event, the child will be tried by a District Court or Supreme Court Judge and jury. Second, a child who is committed for sentence before a Childrens Court Judge on an indictable offence is entitled to reverse his plea and enter a plea of not guilty and, although the relevant section is silent on the matter, it would appear by necessary implication that he should stand trial before a District Court Judge and jury (s. 73).

At the end of the experimental period of 6 months from the inception of the Act I was concerned that the 'right of election' question was a source of serious administrative problems. I therefore spoke to officers of the Family Services Department about proposed resolutions of the problems. I also wrote to the then head of the District Court, His Honour Chief Judge Helman, in the following terms:

8 March 1994

Chief Judge Helman
District Court
BRISBANE Q. 4000

Dear Chief Judge,

I request that in future you identify and segregate juvenile criminal cases committed to the District Court at call-overs and list them for hearing before myself or Judge McMurdo.

In my opinion, it is highly desirable that Childrens Court Judges sit on all juvenile cases – both sentences and trials – even though they have not been committed to a Childrens Court Judge.

As you are aware, a Judge of the Childrens Court is not divested of District Court jurisdiction in relation to juvenile crime. He (or she) wears two hats, which are easily interchangeable.

Yours faithfully,
McGUIRE D.C.J.

The Chief Judge replied:

March 23, 1994

His Honour Judge F. McGuire,
Judges' Chambers,
District Court,
BRISBANE. Q. 4000.

Dear Judge,

I have your letter dated March 8, 1994 in which you requested that in future I identify and segregate 'juvenile criminal cases' committed to a District Court and list them for hearing before you or Her Honour Judge McMurdo.

Having considered the matter at some length and bearing in mind the provisions of the **Juvenile Justice Act** 1992 – and in particular ss. 70 and 71, I have concluded that I should not do as you requested. As I construe ss. 70 and 71 of the **Juvenile Justice Act** it was not intended that the effect of an election, or s. 70(6)(a), should be circumscribed in the way you have suggested.

The present practice is that cases are listed before any available judge of District Courts, including of course judges who are also Childrens Court

judges. I do not propose to take any steps to bring about an alteration to that practice. I see no point of principle that would require such a course. If the Parliament had intended that all children who elect to be committed to a District Court should go before a judge of District Courts who is also a Childrens Court judge it would no doubt have included a provision to that effect in the Act.

I have discussed this matter with the Director of Prosecutions, Mr R.N. Miller Q.C., who has told me that in his opinion the provisions of ss. 70 and 71 preclude a judge of District Courts who is also a Childrens Court judge from hearing in a District Court a matter in which a child is the accused person. As will be apparent from the above I do not share Mr Miller's opinion, but I think you should be aware of it.

Yours faithfully,
CHIEF JUDGE

I then wrote to the Director-General of Family Services as follows:

28 March 1994

The Director-General
Department of Family Services
and Aboriginal and Islander Affairs
GPO Box 806
BRISBANE Q 4001

Dear Director-General,

In our recent discussion you will recall that I raised the problem associated with a child's right under the *Juvenile Justice Act* to be tried or dealt with by a Childrens Court Judge or a District Court Judge. It seems to me that the right of election frustrates the whole purpose of the legislation, which is to constitute a Childrens Court to deal exclusively with juvenile crime.

I have made a genuine attempt to sort the matter out at an administrative level with the Chief Judge of the District Court, but alas! to no avail (see attached correspondence). I should say that I think the Director of Prosecution's opinion, assuming it is accurately recounted in the Chief Judge's letter, is a rather strained interpretation of the relevant provisions of the Act.

As a consequence of the legislation and the Chief Judge's attitude as disclosed in his letter, you have not only in effect, but in fact, two heads of court administering juvenile justice. In my opinion, the head of the

Childrens Court should have complete control over the administration of juvenile justice in Queensland: nothing short of that will do. The present administrative arrangements are, I must say emphatically, wholly unsatisfactory and should not be allowed to continue. If the present dual arrangements are not terminated I cannot be expected to accept responsibility – as I am prepared to do – for the administration of juvenile justice State-wide.

I am adamant in the view that the new Childrens Court should deal with ALL juvenile crime – otherwise public confidence in the new legislation and the Court will be seriously and perhaps irreparably undermined. The public perception is that a special court is dealing exclusively with juvenile crime, and, if I may say so, despite criticism from certain quarters, which is likely to persist, there seems to be a generally favourable public reaction to the new approach to juvenile crime. A report, such as appeared in the Courier-Mail, 23 March, would, I think, tend to quickly disabuse the public of that perception (report attached).

I regard the matter of sufficient importance to seek a conference with your Minister and also the Attorney-General. It seems to me that the relevant legislation should be reviewed with a view to correcting what I believe is a fundamental flaw in the management of juvenile justice.

I should foreshadow that in my annual Report to Parliament I will be obliged to make conspicuous reference to the anomalous position which has arisen, albeit unintentionally – unless, of course, in the meantime, the matter is corrected either administratively or legislatively.

I refer to the following observation I made in my inaugural address (pp. 11–12) on 6 July 1993, before the Act was proclaimed: 'A Childrens Court Judge is empowered, inter alia, to review sentence orders made by Magistrates and to try serious offences sitting alone without a jury. There is, however, a severely limiting feature to the exercise of this jurisdiction: the child must be legally represented and consent to conferring the jurisdiction on a Childrens Court Judge.' [Emphasis added].

Turning to another topic, it will be of interest to you to know that I am presently making arrangements to visit Aurukun during the week commencing 30 May 1994, where I intend to conduct Childrens Court cases and speak to the local population, including the elders. I understand that the Justice Department is agreeable in principle to meet the costs of the visit.

I should be pleased to confer with you at a mutually convenient time about these and any other matters of concern or interest.

It would be appreciated if you could give your urgent attention to the matters raised in this letter.

Yours truly,
President, Childrens Court of Queensland

There ensued discussions with officers of the Department. I once again highlighted the problems and advised abolition of the right of election save where a child elects to be tried by Judge and jury. Trial by jury clearly raises the fundamental constitutional question about which I hold the firmest views. Waiver of right to trial by jury must be the result of an informed, conscious and free decision. Nothing short of that will suffice. There is therefore not the slightest suggestion that the right to elect for trial by Judge and jury should be abolished.

In my discussion with the officers of the Department of Family Services, there seemed to be general agreement in principle to the adoption of the advice I gave. However, there were other related problems of an administrative character which needed talking about and resolving before abolition of the right of election could be contemplated.

Following my discussion with Departmental officers I received a formal written reply to my letter to the Director-General (quoted above). The Director-General's reply was in these terms:

15 August 1994

His Honour Judge F. McGuire,
President,
Children's Court of Queensland,
Judges Chambers,
District Court,
P.O. Box 167 Brisbane,
ALBERT STREET 4002

Dear Judge,

I refer to your letters of 28 March and 29 April 1994. Please accept my apology for the delay in replying to your letters. You can be assured that I have taken steps to ensure prompt replies in future.

I share your concern about present arrangements with respect to children who elect jury trial in the District Court. I have recently written to Barry Smith, Director-General, Department of Justice and Attorney-General, on this very issue in response to his request for clarification. In summary, I advised in the following terms:

> The *Juvenile Justice Act 1992* retained a child's right to elect to be dealt with summarily by a Childrens Court Magistrate or jury trial before a District Court Judge for an indictable offence other than a serious offence.
>
> The jurisdiction of the Childrens Court Judge was conceived of as a new summary jurisdiction for dealing with 'serious' indictable offences that previously could only be dealt with by the Supreme Court or the District Court acting with jurisdiction delegated by the Supreme Court.
>
> The possibility of Childrens Court Judges holding jury trials for children who elect has merit and I could see no policy objections to it as a concept. Indeed it would further the intentions of the Act for children to be tried before judges with a declared interest and expertise in dealing with matters affecting children. I recall that the idea was not pursued during the development of the legislation because resources were likely to extend only to the creation of one additional full-time equivalent judge and the workload implications of the judge's summary and appellate jurisdiction were not known. The main issue will be the ability of Childrens Court Judges to deal with the workload and cost implications for the Department of Justice and Attorney-General of such an approach.
>
> Cost implications aside, it would be possible to achieve the desired outcome by the establishment of administrative arrangements to co-ordinate the appearance of children who have elected jury trials before Childrens Court Judges sitting in their concurrent District Court jurisdiction.
>
> The creation of a separate list of children appearing in higher courts drawn up in consultation with the President of the Childrens Court would appear to be essential to facilitate this.

I finally indicated that I would strongly support such an approach as it would also have the potential to reduce the time it takes a child to get a date for trial.

I am awaiting the outcome of this letter before I consider further options including the need for amendment to the Act. You will be advised of any developments as they emerge.

I am aware that you recently discussed this matter with senior officers of the Department and reiterated your wish to meet with the Honourable the Minister and myself about the issue. Perhaps your Clerk could contact my Executive Support Officer, Ms Liane Kinlyside, on telephone number 224 7038 to arrange a meeting at a mutually convenient time.

Congratulations on your recent visit to Aurukun, which I understand was a success and helped to make the new Childrens Court a tangible reality for that community. I am pleased to hear that my staff were of assistance to you during the visit.

Yours sincerely,

R.L. Matchett (Ms)
Director-General

I have to concede that there were initially good pragmatic reasons for inserting the 'right of election' provisions in the Juvenile Justice Act. The plain fact was that with so restricted a number of appointees as Childrens Court Judges it was, in practical terms, quite impossible to service the whole State, especially when one bears in mind that there are 30 District Courts in Queensland. However, I have proposed a plan to overcome these formidable practical difficulties. The plan I have in mind is revealed in recommendations made later in this section of the Report.

Appointments of Childrens Court Judges

So far there are four duly appointed Childrens Court Judges in Queensland: Judge Trafford-Walker in Townsville, Judge Hanger in Southport and Judges McMurdo and McGuire in Brisbane. The Townsville and the Supreme Court Judges were appointed without consultation with me – something I regret. I should make it clear, however, that there is not the remotest suggestion that the personnel appointed are not suitable. I mention the matter merely as a point of principle.

I accept the proposition that the Childrens Court should be a special Court presided over by specialist Judges and that it is very desirable that the number of Judges appointed to the Court be limited to what is required to administer the legislation effectively. The reason for limiting the number is essentially that Childrens Court Judges should try to develop a rapport with the children

appearing in their Court. For example, should the Judge in a particular case place a child on probation with a warning that should he seriously reoffend during the period of probation he will, unless exceptional circumstances exist, be sent to detention, the same Judge should deal with any breach of probation proceedings.

Citing my own experience over 11 months, only 2 children have so far returned for breach of probation ordered by me (and I have made numerous such orders), and consistent with the warning I gave them when ordering probation in the first instance that they would be sentenced to a period of detention if they reoffended in a serious way, I ordered short periods of detention. The children seemed to understand that this was a just outcome. Fortunately, I am very pleased to be able to report that over 90 per cent of children whom I placed on probation with the strict warnings about the consequences of reoffending during the probation period have apparently taken heed of the warning.

I might add that I take considerable time over the sentencing process. Among other things, I try to speak to the children at their level. More about the procedures I have devised will appear later in this report.

For the reasons advanced, it is of vital importance that the same Judge deal with the same child until he attains 17, should he perchance prove to be a repeat and persistent offender.

Administration

There are 30 District Courts (including Brisbane) in Queensland. They are:

Bowen	Goondiwindi	Maryborough
Bundaberg	Gympie	Mount Isa
Cairns	Hughenden	Rockhampton
Charleville	Innisfail	Roma
Charters Towers	Longreach	Southport
Clermont	Ipswich	Stanthorpe
Cloncurry	Kingaroy	Toowoomba
Dalby	Longreach	Townsville
Emerald	Mackay	Warwick
Gladstone	Maroochydore	

Because of its geography and demography, the administration of Courts in Queensland has posed problems not experienced elsewhere, and which are therefore unique to Queensland. The *Childrens Court Act 1992* empowers the President of the Childrens Court of Queensland to recommend to the Governor-in-Council Rules of Court concerning, though not limited to, procedural matters. The President may also issue directions of general application with respect to the procedure of the Court.

So far I have not recommended any Rules of Court. The reason is that I have endeavoured to keep the practice and procedure of the Childrens Court as simple and as flexible as possible, both in the interests of cost-saving and expedition of dispatch of the work, expedition being a fundamental philosophy of Childrens Court work. However, I have issued practice directions. The practice directions are set out hereunder:

PRACTICE DIRECTION NO. 1 OF 1993

Childrens Court Act 1992; *Juvenile Justice Act 1992*

The Form contained in the Schedule hereto with such variations as the circumstances may require may be used for the purpose for which it is applicable, and when so used shall be sufficient.

F. McGUIRE
President, Childrens Court
20th August, 1993

SCHEDULE

APPLICATION FOR SENTENCE REVIEW — JUVENILE JUSTICE ACT 1992 SECTION 89

TO: .....
Judge

of .....
Childrens Court

I ..... of .....
Applicant's name — Address

apply to the court to have the ..... order
Name of order

made in relation to ..... at the .....
Name of child — Court

..... on ..... reviewed.
Date

The reasons for this application are as follows: .....
.....
.....

....
Date Applicant's Signature

NOTE: AN APPLICATION FOR SENTENCE REVIEW MUST BE MADE WITHIN 14 DAYS OR WITHIN A LATER PERIOD AS ALLOWED BY A CHILDRENS COURT JUDGE.

PRACTICE DIRECTION NO. 2 OF 1993

Childrens Court Act 1992
Juvenile Justice Act 1992

1. Until further notice, Magistrates exercising Childrens Court jurisdiction are to commit defendants to be tried or for sentence, as the case may require, to the Childrens Court at Brisbane, Townsville or Southport according to which is the nearest place to the committing court.
2. For the remainder of the 1993 Calendar year, the four weeks commencing 6 September, 4 October, 1 November and 29 November are appointed as the times when the Court shall sit at Brisbane, Townsville and Southport for the disposal of Childrens Court business by a Childrens Court Judge.
3. Notwithstanding paragraph 2, the President may direct that the Court sit at any time and any place for the expeditious disposal of the Court's business.

F. McGuire
President, Childrens Court of Queensland
26 August 1993

PRACTICE DIRECTION NO. 3 OF 1993

Childrens Court Act 1992
Juvenile Justice Act 1992

Practice Direction No. 2 of 1992 reads as follows:

1. Until further notice, Magistrates exercising Childrens Court jurisdiction are to commit defendants to be tried or for sentence, as the case may require, to the Childrens Court at Brisbane, Townsville

or Southport according to which is the nearest place to the committing court.

2. For the remainder of the 1993 Calendar year, the four weeks commencing 6 September, 4 October, 1 November and 29 November are appointed as the times when the Court shall sit at Brisbane, Townsville and Southport for the disposal of Childrens Court business by a Childrens Court Judge.

3. Notwithstanding paragraph 2, the President may direct that the Court sit at any time and any place for the expeditious disposal of the Court's business.

To complete the 1993 calendar year, I hereby direct that there be a final sittings commencing on 20 December 1993 for which the arrangements set out in paragraph 1 of Practice Direction No. 2 of 1993 will apply.

F. McGuire
President, Childrens Court of Queensland
25 November 1993

PRACTICE DIRECTION NO. 4 OF 1993

Childrens Court Act 1992
Juvenile Justice Act 1992

Arrangements for the 1994 calendar year for juveniles who elect to be dealt with by a Childrens Court Judge

For the 1994 calendar year, Magistrates exercising Childrens Court jurisdiction are to commit juvenile defendants to be tried or for sentence, as the case may require, in accordance with the District Courts' legal arrangements as published in the 1994 Queensland Law Calendar.

The suggested formula for committing juveniles who elect to be dealt with by a Childrens Court Judge is as follows:

(Name), your having elected to be dealt with by a Childrens Court Judge, I hereby commit you (for trial or sentence, as the case may require) to the sittings of the Childrens Court of Queensland appointed to commence at (town) on (date).

F. McGuire
President, Childrens Court of Queensland
25 November 1993

Childrens Court Magistrates Level

An important function of the President is to superintend the operation of the Childrens Court state-wide. I regard as a very significant aspect of the superintending function overviewing Childrens Court work at Childrens Court Magistrates level. Magistrates in Queensland are burdened with the bulk of Childrens Court work. The importance and value of their work should not be underestimated. It is therefore necessary that I keep in regular touch with them and visit periodically Childrens Courts throughout the State. In the time available I have, up to the time of writing of this report, visited Townsville, Cairns, Mt Isa and Mackay.

Accompanying Practice Directions 2 and 4 were memoranda by me to the Magistracy of Queensland. As these memoranda give some insight into the value and confidence I place in the Magistrates Court work I replicate them here:

MEMORANDUM

TO: The Magistracy of Queensland

FROM: President of the Childrens Court

ABOUT: *Childrens Court Act 1992*
Juvenile Justice Act 1992

DATE: 26 August 1993

Ladies and Gentlemen,

I wish to inform you that I have been appointed President of the Childrens Court of Queensland and Mr Pat Smith has been appointed a Childrens Court Magistrate under the Childrens Court Act 1992. As well, Judge Trafford-Walker (Townsville), Judge Hanger (Southport) and Judge McMurdo (Brisbane) have been appointed Childrens Court Judges.

Section 14 of the Childrens Court Act 1992 provides for the appointment of Childrens Court Magistrates. As at present advised, it is not intended, at this stage, to appoint full-time Childrens Court Magistrates in addition to Mr Smith. However, under s. 5(3) of the Act a Childrens Court may be constituted by any Magistrate if a Childrens Court Magistrate is not available. This means, in effect, that all Magistrates in the State may act as Childrens Court Magistrates unless Mr. Smith is available to preside over a Childrens Court outside the Brisbane area. It is assumed

that in provincial towns (such as Townsville, Southport, Toowoomba and Maroochydore), where there are plural Magistrates, the Chief Magistrate will designate a particular magistrate to be the principal magistrate to conduct the Childrens Court.

It is important that all magistrates familiarise themselves with the new legislation and be in a position to adjudicate upon it as from 1 September 1993 when the *Childrens Court Act 1992* and the *Juvenile Justice Act 1992* will be proclaimed. As with most new legislation, it is probable that there will be some early problems in its administration and practical implementation. I invite you to draw my attention to any problems, either with the legislation itself or in its day to day administration, which give rise to concern. I would be obliged if you would forward me any submissions or suggestions which, in your opinion, would overcome apparent difficulties or anomalies in the legislation and enhance its efficacy.

A ceremony was held in Brisbane on 6 July 1993 to mark the inauguration of the Court. I attach for your information a copy of the transcript of proceedings. It will be apparent from my own remarks that I regard the legislation as a new model for the management of child offence cases. Juvenile crime is, unfortunately, uncomfortably prevalent. It is a matter of serious concern to all: the Government, the Judiciary, the family unit and society at large.

It would be too roseate a view to take that we can change the human condition overnight. Nevertheless, we must strive to improve upon it by a sober, considered, compassionate and measured response to juvenile crime aided and assisted by the new legislation.

I have in the past heard Magistrates, Judges and others comment dejectedly that with juvenile crime they feel they are labouring in blossomless fields. I would encourage a dissipation of this despairing attitude. Given the right conditions and sensible, workable legislation, combined with a sense of dedication on the part of all concerned, I am confident that those of us now involved in the area of juvenile crime can make a significant contribution towards the furtherance of law and order.

As you may appreciate, one of the reasons for appointing a President of the Court is to have someone superintend the operation State wide with a view to achieving some degree of co-ordination and consistency of approach by laying down general guidelines and enunciating principles.

Under s. 8(2) of the Childrens Court Act, the President is empowered to issue directions of general application with respect to the procedure of the Court. In the early stages, I expect that, to some extent, we will have to proceed empirically and learn from experience. However, it is imperative that I issue the practice directions attached hereto before 1 September 1993. It may be that it occurs to you that other practice directions should be issued urgently to cover areas of uncertainty or ambiguity. If so, let me have your views as soon as possible.

There will also be a need to issue administrative directions from time to time, which I will instruct the 'proper officer' of the Court to draft and promulgate.

As has happened in the past, the trusty and worthy Magistracy will continue to bear the brunt of the juvenile justice work. With that in mind, please do not hesitate to write to me, or phone me in cases of urgency, if there is anything on which you would like to receive advice or guidance, and I will do my best to give you an expeditious response.

With all best wishes in your new endeavour –

Yours truly,
President
Childrens Court of Queensland

enc.

MEMORANDUM

TO: The Magistracy of Queensland

FROM: President of the Childrens Court of Queensland

ABOUT: *Childrens Court Act 1992*
Juvenile Justice Act 1992

DATE: 25 November 1993

Ladies and Gentlemen,

I refer to my Memorandum of 26 August 1993. Attached to the Memorandum was Practice Direction No. 2 of 1993.

Practice Direction No. 2 of 1993 was an interim direction only. It was never intended that the committal arrangements stated therein should be perpetuated. Indeed, it is transparently clear that to confine committals for the whole State to Townsville, Brisbane and Southport is, in practical

terms, wholly unworkable long term, especially when one has regard to the geography and demography of Queensland. There are in fact 30 District Courts of Queensland (including Brisbane). One could not realistically expect a child who commits an offence at, say, Mt Isa, at which place the committal proceedings are held, to elect to be dealt with by a Childrens Court Judge at Townsville, when he could much more conveniently be dealt with at Mt Isa. Such examples can be multiplied.

The principal reason for issuing Practice Direction No. 2 of 1993 was the reluctance on the part of the Family Services Department to agree to the appointment of more Childrens Court Judges. At present, District Court Judges appointed as Childrens Court Judges are Trafford-Walker (Townsville), Hanger (Southport) and McMurdo and McGuire (Brisbane).

Because of the impracticability of the present committal arrangements, I have decided to issue a new Practice Direction for 1994 to replace the old Direction. As you are aware, each year legal arrangements for that year for all Courts in Queensland are published in the Queensland Law Calendar. Included in the arrangements are the places and times the District Court sits in the 30 Courts of the State. For both practical and administrative reasons I have decided to append (or 'tack on') to the District Courts arrangements as published in the Law Calendar matters committed to a Childrens Court Judge. In other words, committals of matters to a Childrens Court Judge will in future be to the Court where the committal would ordinarily be made if the matter committed was a non-Childrens Court Judge matter.

With the adoption of the new committal arrangements there will be obvious problems of an administrative character mainly associated with the limited number of Childrens Court Judges so far appointed to service the whole State. However, I am confident that ways and means can be found to overcome those problems.

I repeat the request I made in my Memorandum of the 26 August to let me have your views on any aspect of Childrens Court work. The aim is to ensure that the new legislation works as well as it can be made to work. If you have any queries about the new Direction, or about anything else, do not hesitate to contact me personally, in which event, like the inimitable Jeeves of P.G. Wodehouse fame, 'I shall endeavour to render satisfaction, Sir.'

I am most interested in keeping accurate statistics on a continuing basis on juvenile committals to higher courts State-wide. You have, I know, already been asked to furnish a weekly return of committals, whether for

trial or for sentence, for each Magistrates Court District. I should make it clear that the return should show not only committals made to a Childrens Court Judge, but also committals made to the District Court or Supreme Court in the usual way. The purpose of these statistics is to keep a close eye on serious juvenile crime in all parts of the State.

The importance of the returns is that it enables me to see at a glance what is happening around the State week by week. The returns will provide very useful information for administrative purposes. Please send the return weekly whether or not there have been committals for that week. I would be greatly obliged if you would strictly comply with this request. The weekly return should contain the following information:

1. Name of juvenile
2. Age
3. Committing Court
4. Date of committal
5. Court committed to
6. Sittings committed to
7. Charge(s) on which committed
8. Bailed or not
9. If bailed, terms of bail

Please send the returns to me at the District Court, Brisbane (not the Childrens Court).

No doubt 1993 has been an arduous year for you, but I hope it has also been a rewarding year.

Finally, allow me to express my heartfelt thanks to you all for your valued efforts in endeavouring to achieve a substantially improved juvenile justice system, a system which will, I expect, in due course gain general public and professional acceptance; for that is the goal.

All best wishes to you and yours for Christmas and the New Year.

Yours truly,
F. McGUIRE
President, Childrens Court
of Queensland

In addition to the memoranda to Magistrates and my visits to the towns mentioned, I have addressed gatherings of Magistrates from all places south of Rockhampton at a Domestic Violence Conference on 28 and 29 April 1994, and there will be a Childrens Court Seminar on 15 November 1994, presided over by myself and Mr Pat Smith, the Brisbane Childrens Court Magistrate, which Magistrates from all parts of Queensland will attend. The seminar will be held in conjunction with the annual conference of Queensland Magistrates. The seminar should be an annual affair at least. I regard it as of paramount importance that I speak face to face with Magistrates about the Court, their experiences and the possible resolution of general or local problems. The whole idea of appointing a head of Court is to ensure that the work be conducted on a coordinated basis and that, from the joint experience of Magistrates and Judges participating in Childrens Court work, there will evolve general principles and guidelines to which I, as the head, should give voice.

Further Administrative Problems of Election and Recommendations

The administrative difficulties brought about by the right of election are further demonstrated and reinforced in my memorandum to the present Chief Judge of the District Court, His Honour Judge Shanahan with regard to writing a law calendar for the Childrens Court for 1995. The memorandum is self-explanatory and is quoted hereunder:

MEMORANDUM

FOR: His Honour Chief Judge Shanahan

FROM: McGuire DCJ

DATE: 4 August 1994

ABOUT: Law Calendar for 1995

For the current year (1994) approximately 1 week in 4 was allocated for Childrens Court work in Brisbane. This allocation of time has proved adequate until recently. There seems to be a greater tendency to elect to be dealt with by a Childrens Court Judge.

On the assumption that the right of election is preserved, I think about 15 weeks for Brisbane should suffice for 1995, but adjustments up or down may be required.

On the assumption that the right of election is abolished by the beginning of the 1995 calendar year, I would expect that the amount of time required for Brisbane would be at least 30 weeks. Although we are in the process of extracting from the general system (i.e. District Court) child cases dealt with in the District Court since the *Juvenile Justice Act* came into operation on September 1, 1993, it is unlikely we will have a result for some weeks yet. The Court Administrator, Mr Robinson, and my clerk are working on the statistical extraction, but because there has been no clear identification and segregation of child crime cases, the task of identification of child cases which have gone through the system since September 1 1993 is proving problematic. Unless the right of election is abolished, children will continue to have the right to be dealt with either by a Childrens Court Judge or the District Court in all parts of the State (and there are, including Brisbane, 30 District Court districts in Queensland). Therefore, if the right of election is not abolished, it is likely that some Childrens Court cases will be committed to any of the 30 districts in Queensland. The sort of problems that will result are obvious.

I am, as you know, in my report to Parliament (due on 31 August 1994) recommending, inter alia, that the right of election be discontinued, that additional Childrens Court Judges be appointed to Cairns and Rockhampton, and that I be empowered to delegate Childrens Court jurisdiction to any Judge of the District Court according to the exigencies of each district.

If my recommendation is adopted, Judge McMurdo will be required to do her share of Childrens Court work in Brisbane and elsewhere.

So far there has been no problem in Brisbane, Townsville or Southport where Childrens Court Judges have been appointed. The problem to date has been in other places.

It follows from what I have said about the uncertainties which cloud the issue for next year that it is not practicably possible to write a calendar for Judge McMurdo and myself for 1995 with any confidence that it will not need substantial adjustments. A fair degree of flexibility may be required.

In summary, if the right of election continues to exist for the whole of 1995, I estimate that about 15 weeks will be required for Brisbane. All other districts outside Townsville and Southport will require attention from Childrens Court Judges from time to time. Again, there has to be a degree of flexibility about this.

If, on the other hand, my recommendation is adopted in full, I think about 30 weeks all told would be required for Brisbane, which should be shared between myself and Judge McMurdo.

I regret I cannot put the position more positively at this point in time. Perhaps by the end of the year the position for next year will become clear.

In short, as at present advised, I should have a fair degree of flexibility. It seems likely that no matter what calendar you write for me for 1995, adjustments will be necessary from time to time.

With the foregoing in mind, I think the best suggestion is to make my calendar for 1995 mostly criminal (as is the case for this year).

Whatever happens, I think I should myself occasionally conduct sittings in various circuits (Cairns and Mt. Isa particularly, these being trouble spots). If there is insufficient Childrens Court work to fill a sittings, I could do adult crime.

Should you wish to discuss the matters raised in this letter with me, I am at your disposal.

Yours truly,
McGUIRE D.C.J.

Chief Judge Shanahan, who was appointed head of the District Court only a matter of weeks before my memorandum to him of 4 August, saw at once with his usual discernment that the recommendations that I foreshadowed in the memo were not only well worth considering, but also necessary.

The above lengthy preamble leads me to make the following recommendations:

1. The right of election (which applies only for serious offences) should be abolished and children committed on serious offences should be committed to a Childrens Court Judge.
2. A Childrens Court Judge should be appointed to Cairns and another to Rockhampton.
3. To cope with the consequential increase in committals of children to a Childrens Court Judge, I, as President of the Court, should be empowered to delegate Childrens Court jurisdiction to any District Court Judge according to the exigencies of each district. This means

> that if, for example, a child is committed to a Childrens Court Judge at Charleville on a serious offence for a particular sittings of the District Court at that place and a Childrens Court Judge is not available to go to Charleville to hear the case, then I, as President, should be empowered to delegate jurisdiction to hear and determine the case to a District Court Judge visiting Charleville to do the regular District Court sittings there in accordance with the legal arrangements for the year. It is only in this way that proper control can be exercised over Childrens Court work in every part of the State.

The head of the Childrens Court of Queensland should be in a position to report to the head of the District Court and to the responsible Minister the precise state of juvenile crime in any place in Queensland and in Queensland as a whole on at least a quarterly basis.

Delegation of jurisdiction is not a novel concept. Section 126 of the Juvenile Justice Act provides for a Childrens Court Judge's extended sentencing powers in respect of detention and probation to be delegated to a Magistrate in a particular case. Where the Magistrate considers that the maximum period of probation or detention would be inadequate in the circumstances of the case, the Magistrate may request a Childrens Court Judge to delegate increased sentencing power. In country centres, where the Court sits infrequently, such a delegation may prevent a child from being subjected to lengthy adjournments and possible remand in custody.

Redefining a serious offence

Indeed, I think the definition of 'serious offence' needs reconsideration. Experience thus far shows that the most common indictable offences committed by juveniles are housebreaking, breaking and entering a place (other than a dwelling house) and stealing, unlawful use of a motor vehicle and breaking and entering a place with intent to commit an indictable offence. Housebreaking and breaking, entering and stealing are offences for which an adult would be liable to 14 years imprisonment, whereas breaking and entering a place with intent to commit an indictable offence and unlawful use of a motor vehicle simply are offences for which an adult would be liable to 7 years imprisonment. However, if

there are aggravating circumstances associated with the unlawful use of a motor vehicle, such as using the vehicle to commit a crime (e.g. robbery) or wilfully destroying, damaging or otherwise interfering with the mechanism or equipment attached to the motor vehicle, the adult punishment is 10 and 12 years respectively. I merely mention these types of crime commonly committed by juveniles as illustrative of the difficulty of attempting to define what constitutes a 'serious offence'.

It seems to me that the line dividing serious and non-serious indictable offences is somewhat arbitrarily drawn in the legislation (s. 8). At the risk of being controversial, I would respectfully submit that the line should be redrawn so that all indictable offences carrying a maximum adult imprisonment of 7 years or more fall within the definition of 'serious offence'. I recommend accordingly.

There have been recent press reports that Cabinet has approved the reclassification of certain indictable offences which hitherto would have been regarded as non-serious indictable offences (under the *Juvenile Justice Act 1992*) and raised the maximum sentence for those offences to 14 years or more, which would bring them within the definition of a 'serious offence' under s. 8 of the Act. Because of the obvious relevance to the recommendation I make about redefining what constitutes a 'serious offence' under the Juvenile Justice Act, I attempted to obtain through the Department of Justice and Attorney-General a copy of the Cabinet Minute approving such reclassification of offences but was informed that it could not be made available to me: hence I remain ignorant of the precise intended reclassification of offences with corresponding upgrading of penalties at the time of submitting this report.

Assigning all juvenile cases to Childrens Court judges

Even if my recommendation that the right of election should be abolished is not adopted, juvenile cases should be placed on a separate list and at a callover cases should be assigned to a Childrens Court Judge, if available. There is no technical or other reason why a Childrens Court Judge in his or her capacity as a District Court Judge should not try (with a jury) or sentence juveniles committed to the District Court as distinct from a Childrens Court Judge.

As I have said, a Childrens Court Judge exercises concurrent jurisdiction. The Judge wears two caps (a District Court Judge's cap and a Childrens Court Judge's

cap) which are interchangeable. Juveniles committed to higher courts should have their papers conspicuously stamped 'Juvenile', so that their cases can easily be identified.

Despite my attempts to achieve these administrative arrangements, nothing has been done. The point I make is this: the head of the Childrens Court of Queensland must have complete control over the management of juvenile crime, otherwise he cannot be expected to accept responsibility for juvenile crime state-wide. Under the present arrangement of dual control, neither the head of the District Court nor the head of the Childrens Court of Queensland can hope properly to advise the Government of the day on the true state of affairs. Either the position of President of the Childrens Court of Queensland should be abolished or he should be given full control over the management of juvenile crime in Queensland. I made this point strongly, it will be recalled, in my letter to the Director-General of Family Services, which is quoted in full above.

5. Sentencing Powers – Are they adequate?

The Juvenile Justice Act classifies indictable offences into serious and non-serious offences. A serious offence is defined by s. 8 to mean a life offence or an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for 14 years or more.

Proceedings before a Childrens Court Magistrate in which a child is charged with a serious offence must be conducted as a committal proceeding (ss. 68, 69). A child may elect to be committed to a Court of competent jurisdiction (other than a Childrens Court Judge) for trial before a Judge and jury, or to be committed for trial before a Childrens Court Judge without a jury (s. 70). If the child enters a plea of guilty at the committal proceeding the child may elect to be committed for sentence before a Court of competent jurisdiction (other than a Childrens Court Judge), or to be committed for sentence before a Childrens Court Judge.

For non-serious indictable offences a child may elect to be dealt with summarily by a Childrens Court Magistrate or may elect to be committed for trial or sentence to a Court of competent jurisdiction (ss. 76–79).

Curiously, 'a court of competent jurisdiction' is not defined either by the *Juvenile Justice Act 1992* or the *Childrens Court Act 1992*, but, by clear implication, it means the District Court or the Supreme Court.

The Magistrate must refrain from hearing and determining summarily a charge for a non-serious indictable offence unless satisfied that the charge can be adequately dealt with summarily (s. 64).

Sentencing Powers

The sentencing powers of a Childrens Court Magistrate are defined by s. 120 of the Act and the sentencing powers of the Judge are defined by s. 121. 'Judge' in this context means a Childrens Court Judge or a Judge of a Court of competent jurisdiction (i.e. a Supreme Court or a District Court Judge). Section 121 does not limit a Judge's power to make a sentence order under s. 120. The result is that Judges must exercise the sentencing powers provided for in s. 120 for non-serious indictable offences, but may avail themselves of the sentencing powers under both ss. 121 and 120, as may be appropriate to the circumstances of the case, when sentencing for a serious offence.

Sentencing powers of a Childrens Court Magistrate

A Childrens Court Magistrate, however, is strictly restricted to the sentencing powers under s. 120.

What, then, are a Childrens Court Magistrate's sentencing powers when sentencing for simple offences or non-serious indictable offences where consent jurisdiction has been conferred by the child pursuant to the provisions of ss. 76–79 of the Juvenile Justice Act? They are:

(1) reprimand;

(2) good behaviour order for a period not longer than one year;

(3) fine;

(4) probation for a period not longer than one year;

(5) community-service order for a period not longer than 60 hours for a child aged 13 to 15 years and for a period not longer than 120 hours for a child aged 15 to 17 years; and

(6) detention for a period not longer than six months with power to suspend conditionally (ss. 175–177).

Limitation of Sentencing Orders to One for Each Offence

Section 120(2) restricts the Court's powers to one sentence order for a single offence. For example, the Court cannot order both probation and community service for the one offence. In short, the Court must make a choice of various sentence-order options when sentencing for the one offence. This limitation on the Court's power, in my opinion, needs reconsidering for reasons which I will shortly mention.

The sentencing powers under s. 121 for a serious offence are:

(1) probation for a period not longer than 3 years;

(2) for an offence other than a life offence (e.g. housebreaking) detention for a period not longer than a period equal to one-half the maximum term of imprisonment an adult convicted of the offence could be ordered to serve; or 7 years, whichever is the shorter period;

(3) for a life offence (e.g. murder, rape, armed robbery) detention for a period not longer than 10 years; or for 14 years if the offence involves personal violence and the Court considers the offence to be a particularly heinous offence having regard to all the circumstances.

Compensation

In addition to making any of the sentence orders delineated above, the Court may order the child to pay compensation to the victim for loss to property or for personal injury. However, the maximum compensation the Court can order a child to pay is $1,200 (ss. 122, 192, 231).

Referral and Delegation of Sentencing Power

There are two other aspects of sentencing I wish to canvass before I give my opinion on the adequacy of the sentencing powers under the Juvenile Justice Act. Section 127 of the Act enables a Childrens Court Magistrate to refer a case to a Childrens Court Judge for sentence. The section provides:

> 127. (1)If, in a proceeding for the sentencing of a child for an offence, a Childrens Court Magistrate considers that the circumstances require the making of a sentence order –
>
> (a) beyond the jurisdiction of a Childrens Court Magistrate; but
>
> (b) within the jurisdiction of a Childrens Court Judge;
>
> the Magistrate may commit the child for sentence before a Childrens Court Judge.
>
> (2) In relation to a committal under subsection (1), the Childrens Court Magistrate may make all orders and directions as if it were a committal following a committal proceeding.
>
> (3) The Childrens Court Judge may exercise sentencing powers to the extent mentioned in section 120 (Sentence orders – general).

This, in my view, is a very sensible provision, especially when the Magistrate is dealing with a persistent offender who is before the court on multiple charges, and I am pleased to report that Magistrates generally, and in particular the Brisbane Childrens Court Magistrate, Mr Pat Smith, have referred consistently with repeat offenders.

Section 126 allows a Childrens Court Judge, on request from a Childrens Court Magistrate, to delegate sentencing power beyond that conferred on Magistrates under s. 120. So far no such request has been made. Clearly, a delegation of sentencing power should only be made in cases where it would be inconvenient either by reason of the remoteness of location of the Childrens Court or the expense involved to refer the matter to a Childrens Court Judge. At the present time Childrens Court Judges are centred only in Townsville, Brisbane and Southport.

The provision for delegation of power is a prudent one. I would encourage Magistrates to make delegation requests in the circumstances adumbrated above.

A further reason for delegation is the need for the expeditious dispatch of Childrens Court work in all parts of Queensland. One only has to have regard to the geography and demography of Queensland to realise that a delegation would be appropriate in the case where a child offender in, say, Cunnamulla who wishes to plead guilty to the offence with which he is charged, but the Magistrate feels that his limited sentencing powers are inadequate. For example, he may have in mind probation for a period longer than one year (the maximum he can order).

Anomalies and Deficiencies

In my opinion, the sentencing powers conferred on Magistrates and Judges under the Juvenile Justice Act are generally adequate. But in the relatively short life of the legislation I have to say some anomalies and deficiencies have been experienced. It sometimes takes a peculiar set of circumstances to point up an anomaly or deficiency in otherwise sound legislation. The best way to illustrate the point is to refer to an actual case where, on its special facts and circumstances, a deficiency in the Court's sentencing power became apparent. The case I refer to is *R v. P.* Because of the sentencing problem which the facts of this case highlight, I took the trouble of delivering a reasoned judgment. The judgment explains the factual background against which the problem occurred. Reference is made in the judgment to the relevant sections of the Juvenile Justice Act. The judgment speaks for itself. I quote the judgment in full hereunder:

> HIS HONOUR: On 27 June you pleaded guilty in this Court on indictment to 10 counts of unlawful use of a motor vehicle, two counts of dangerous driving, one count of breaking and entering a place with intent

to commit an indictable offence and one count of stealing. These offences were committed between 26 March 1993 and 27 February 1994.

In addition to the indictment counts, you have asked the Court to take into account 66 other unlawful use of motor vehicle offences and three stealing offences when imposing sentence. These offences were committed between September 1992 and February 1994. In total 76 offences of unlawful use of a motor vehicle were committed between September 1992 and February 1994.

Although you have been charged with only two dangerous driving offences, a number of the unlawful use offences are associated with driving akin to dangerous driving. You seem to derive some perverse pleasure out of driving vehicles at break-neck speed. Often the purpose of the speedy driving was to goad police into pursuing you. You got a thrill out of the chase. On one occasion a pursuing police vehicle came to grief against a power pole.

On your own admission you are obsessed with motor cars. Profit was not the motive for the taking of the cars. Joy riding and the thrill of the chase seem to have been the dominant motives. Although you did not gain financially from your criminality, you caused substantial damage to a number of the cars you illegally took.

In relation to the 10 indictment unlawful use offences, damage totalling $20,731 was caused to the vehicles; and of the 66 schedule offences, damage of $83,080 was caused to the vehicles. In the result, over $100,000 damage was caused to vehicles you unlawfully used.

You are now aged 16. The offences were committed when you were aged 14 and 15. It should be said in your favour that you volunteered self-incriminating information in relation to all or most of the schedule offences. The Crown concedes that but for your volunteered information many of the offences for which you are being sentenced today may not have been prosecuted to conviction.

In accordance with well-established sentencing principles, you are to be given credit for your cooperation with the police and for admitting offences about which the police had no direct evidence implicating you.

You were remanded in custody for these offences on 25 February 1994. You escaped from custody on 17 June. You have a prior criminal history. You have been guilty on 20 previous occasions of unlawfully using a motor vehicle, two of which were with circumstances of aggravation. You have also been guilty of two dangerous driving offences.

All things considered, it is clear that you have become a public nuisance. The public need protection from your persistent criminality. Not only did you take cars, but by your dangerous driving you were a potential danger to the law-abiding road users.

I see my responsibility in this matter as three-fold:

1. to protect the community;
2. to act in the best interests of your welfare;
3. to uphold the dignity of the law and public faith in the judicial system.

You are of French and Italian extraction. Your parents migrated to Australia in 1971. You were yourself a victim of a car accident when aged seven. According to the pre-sentence report, you have not attended school since 1991. You have been a rebellious child, not amenable to family or school discipline. The report also contains the following:

> 'It has been my assessment over a period of time that P gains dominance in his peer group and enjoys a reputation for the way he handles cars. He appears to have an inflated notion of his skills in manoeuvres such as the 180 degree turn, his maintenance of continuing a high speed and his ability to hot wire cars and is recognised as a pro. This feeds P's pride in himself and gives him a focus, self-identity and social significance.'

The adult punishment for unlawful use of a motor vehicle, simply, is seven years imprisonment; for dangerous driving, simply, is three years imprisonment; for breaking and entering a place with intent to commit an indictable offence is seven years imprisonment; and for stealing is three years imprisonment.

The above comprise the offences mentioned in the indictment, but I must sentence you as a child under the relevant provisions of the Juvenile Justice Act. Section 8 provides that a serious offence means a life offence or an offence of the type that, if committed by an adult, would make the adult liable to imprisonment for 14 years or more.

Normally a Childrens Court Judge's jurisdiction is restricted to sentencing for serious offences; that is to say, offences attracting for adults life imprisonment or 14 years or more imprisonment. However, section 127 of the Juvenile Justice Act provides that a Childrens Court Magistrate may refer a case to a Childrens Court Judge if he is of opinion that the circumstances require the making of a sentence order beyond his jurisdiction. There has been a reference here.

A Childrens Court Magistrate's sentencing powers are set out in section 120. The maximum period of detention a Magistrate can order is six months, whereas a Childrens Court Judge may detain for non-serious offences for up to two years; for serious offences, generally, for up to seven years.

It follows from what I have said that none of the offences with which I am dealing are serious offences as defined by section 8 of the Juvenile Justice Act. Therefore the sentencing powers for serious offences provided for in section 121 of the Act are not applicable. The result is that the maximum sentence I can impose for any of the offences with which the Court is dealing today is two years detention.

In my opinion, this is a case which clearly calls for a detention sentence. The question is, is the Court restricted to two years or can it go further? The answer to the question lies in the power of the Court to order cumulative sentences. I turn to an examination of the relevant provisions of the Juvenile Justice Act.

Section 169 headed, 'Detention orders ordinarily concurrent':

> 'If at the time a Court makes a detention order against a child for an offence the child (a) is serving, or (b) has been sentenced to serve, a period of detention for another offence, the period of detention under the Court's detention order must be served concurrently with the other period of detention, unless other provision is made under section 170 (Court may order detention period to be cumulative) or another Act.'

Section 170 headed, 'Court may order detention period to be cumulative':

> '(1) If at the time the Court makes a detention order against a child for an offence the child (a) is serving, or (b) has been sentenced to serve a period of detention for another offence, the Court may order the period of detention under the Court's detention order to take effect from the end of the other period of detention.'
>
> Section 171 headed, 'Limitation on cumulative orders' (the most relevant section):
>
> '(1) A Court making more than one detention order under section 120 against a child on the same day or in the same proceedings is not to direct that a detention order be served cumulatively with another of the detention orders if the total period of the detention orders would exceed (a) when made by a Childrens Court

> Magistrate, six months, or (b) when made by another Court, two years. To the extent that the total exceeds the maximum allowed the orders are of no effect.'

As I have already said, these being non-serious offences, the Court is restricted to the sentencing powers contained in section 120. It is apparent that on a proper construction of sections 169, 170 and 171 this Court cannot, in the circumstances outlined above, order a total period of detention which exceeds two years.

I must say I did have in mind a sentence of detention in excess of two years, but my hands are tied. The situation which has arisen is not altogether unusual. It seems that the draftsman of the legislation did not contemplate a situation such as this arising. If he did, I feel sure he would have made provision for it. In my opinion the sentencing power in this case, with such multiplicity of charges, is inadequate, but, as I say, I am bound by the legislation.

Having said that, I should say this. The legislation is still in its infancy. It has been in operation only 10 months. As is to be expected, we are experiencing some teething troubles, but none of them is insurmountable. I will in due course be making recommendations to the Parliament about some changes to the legislation – both procedural and substantive – but protocol requires that I refrain from speaking publicly on proposed changes until I have tendered advice to the responsible Ministers – the Attorney-General and the Minister for Family Services.

By and large, the legislation is in concept sound. The Childrens Court Act and its companion Act, the Juvenile Justice Act, are comprehensive pieces of legislation which contain commendable measures to combat juvenile crime. In my opinion, generally, the sentencing powers are adequate. It is in the application of those powers in particular cases that has been the main cause of public concern, dissatisfaction and even dismay.

No less an authority than the Lord Chief Justice of England, Lord Taylor, has recently stated that there is no such thing as an absolutely right sentence. In most cases all one can hope for is a reasonably adequate sentence.

I turn now to the sentence to be imposed in this case. The child has spent 143 days on remand in custody in connection with these offences. The legislation provides that he be given credit for those days. As the maximum sentence I can impose is two years in relation to all the offences, it matters not whether I impose, in relation to the indictment offences, one year each

and order that the first and the last be made cumulative, making effectively two years to serve, or whether I simply order two years for each offence to be served concurrently. Whichever course one adopts, the result is precisely the same.

In relation to each of the indictment charges, the sentence of the Court is that you be detained for two years. By law, the sentences will be served concurrently.

I order, pursuant to section 174 of the Act, that the period of 143 days for which you were held in custody pending the completion of these proceedings be counted as part of the period of detention that is served in a detention centre; and pursuant to section 167, I order that a warrant issue in the prescribed form directing the Commissioner of Police to take the child P. into custody and deliver him to a detention centre determined by the chief executive.

In the circumstances I order that convictions be recorded.

Sentencing Recommendations

The anomaly in sentencing powers which this case so dramatically illustrates is easily cured. A Judge should be empowered to accumulate individual sentences for multiple non-serious offences for up to seven years. If seven years in unacceptable, I recommend not less than five years. And a Childrens Court Magistrate should be able to accumulate sentences for multiple offences for up to one year. In recommending these upper limits it should be remembered that Courts very seldom impose a maximum sentence. However, in exceptionally bad cases the power to impose the maximum sentence should exist.

Multiple charging is no longer an uncommon phenomenon. Also, taking other offences into account when imposing sentence for offences charged on indictment pursuant to the provisions of s. 189 of the *Penalties and Sentences Act 1992* is a device nowadays commonly availed of. Therefore, appropriate sentencing provision should be made to cope with such cases. Section 171 of the Juvenile Justice Act should be amended to give effect to the above recommendation.

There are times when a juvenile with a criminal history comes before a sentencing court on multiple offences. The nature and extent of the current

offending, when viewed against a background of past offending, makes a sentence of detention unavoidable. Because of the child's age or other extenuating circumstances the Court may be disinclined to order a long period of detention, and yet the Court may think that the child is in need of Court-controlled, long-term supervision, which only a probation order can provide.

Once a sentence of detention is served, whatever the period, the Court loses control over the child's future conduct. There should be power to order short-term detention with follow-up probation. There is no present power under the Juvenile Justice Act to do that. Under the *Penalties and Sentences Act 1992*, which provides a sentencing regime for adult offenders, there is power to sentence to a term of imprisonment for not longer than six months with follow-up probation for up to three years (ss. 91, 92).

I recommend that a similar sentencing power be vested in Magistrates and Judges when sentencing juvenile offenders. The specific recommendation I make is that a Childrens Court Magistrate, a Childrens Court Judge and a Court of competent jurisdiction be empowered to sentence a juvenile to detention for a period not longer than six months with follow-up probation for a period not longer than one year.

When sentencing a juvenile for one offence only, the Court cannot order both probation and community service; yet, if the Court is sentencing for multiple offences, the Court may order both. It is possible to combine probation with community service when sentencing adult offenders for a single offence (s. 109, Penalties and Sentences Act).

I can see no reason in fact or in principle why a Court sentencing a juvenile should not be able to order both. Community service is an exercise in civic virtue. Probation keeps the offender under supervision for a stipulated period and entitles the Court to re-sentence the offender should he reoffend during the probation period. Generally, a combination of the orders is the best option when detention is avoidable. As I have said, this combination serves the dual purpose of placing the offender under strict supervision and at the same time compelling him to return something to the community he has offended by rendering service to that community. For myself, I place considerable importance on this combination of sentence orders. In the result, I recommend that courts sentencing a juvenile for a single offence be empowered to order both probation and community service.

In the case of *R v. T.* I expounded the virtues of probation and community service. I quote from the judgment:

> Before I make these orders I want to say something about probation and community service, because I have a very distinct feeling that probation as a sentencing option is wrongly perceived and seriously misunderstood by the general public. Probation has been regarded as one of the corner stones on which Childrens Courts were built. It is a farce to order probation unless there is an efficient system of probation. Probation should not be seen as a paper order, a toothless tiger.
>
> A probation order is intended to ensure that the child for whose benefit the order is made receives appropriate counselling and supervision for the period of the order. The ultimate sanction for disobedience to the terms of a probation order, and especially for reoffending during the probation period, is, in the case of a child, detention and, in the case of an adult, imprisonment.
>
> In other words, if a Court orders two years probation, should the probationer reoffend during that term the Court can re-sentence the child for the offences for which probation was ordered, including the recording of convictions, if no convictions were recorded. This ought to be better understood. Probation is not an absolute discharge. It is a conditional discharge, and the important condition of the discharge is that the offender must not reoffend, because, if he does, he can be re-sentenced and detained if he is a child, and I have so warned all children under the new system, and I am now warning you in the strongest possible terms. If you don't remember anything else that I say today, remember this: if you reoffend in a serious way – not in a trivial but in a serious way – during the next two years (because that is going to be the period of probation) I would need to have exceptional reasons advanced to me why you should not be sent to detention for a significant time.
>
> ...
>
> The importance of probation in the overall scheme of juvenile justice cannot be overestimated. It is from this form of dealing with delinquent children that the remedial effects are especially looked for and the measure of success will be found in the manner in which the probation officers – I stress this – are able to apply themselves to their charges. It is no exaggeration to say that the most important person in the juvenile justice system is the probation officer. In large measure Childrens Courts must place their faith in probation; similarly, with community service. Although community service is a short-term order, it is a beneficial order for children.

> I incline to the view that, where detention is avoidable, very often a combination of probation and community service is the most desirable disposition of the case. Community service enables the child to return something to the community which he has offended by his criminal conduct. As well, community work gives children the framework in which to learn civic virtue and responsibility. Morality is taught by being lived. It is learnt by doing. In my opinion, community work, in many instances, is more powerful than moral instruction.
>
> Now, I hope that what I say is imparted to the public. Courts should explain their orders. Bare orders, without explanations, are meaningless. There is, understandably, in those circumstances a public perception that the Courts are failing in their duty to the community.
>
> I don't think I should say more on the subject today but, if necessary, I will expand on it in the future. You are warned: for the next two years if you commit a serious offence you will, unless exceptional circumstances can be advanced, be sent to a detention centre for a significant time and convictions will be recorded for these offences. So the non-recording of convictions on this occasion (as I intend) is conditional on your not reoffending over the next two years. If you do, convictions will be recorded for every one of these offences.

I am also of the opinion that the maximum number of hours for which the Court can order a juvenile to perform community service is too restricted. I would recommend lifting the present maximum of 60 hours for a child aged 13 to 15 to 100 hours, and the present maximum of 120 hours for a child aged 15 to 17 to 200 hours. These hours compare with a maximum of 240 hours for adult offenders.

I make these recommendations concerning community service because of the great civic virtue attached to such service. As Dr Jonathon Sachs, Chief Rabbi of Britain, has so wisely said:

> We have given our children no framework within which to learn civic virtue and responsibility. We must devise ways by which service to the community becomes a part of every child's experience of the growth to adulthood. Morality is taught by being lived. It is learnt by doing. Community work is more powerful than any form of moral instruction.

I quote the following from *Children in Justice*, by O'Connor and Sweetapple, because it so wonderfully exemplifies the simple truth that a child who is taught to create never destroys – hence the moral worth of community work:

> The response to juvenile crime should be oriented by a concern to reconcile victim and offender, to put right the harm that has been done.
>
> The necessity of reconciliation is especially important for juveniles because their crimes are primarily committed in their local community. Crime is prevented not by threat and intimidation, but by the fabric of social connectedness between people, their community and their physical environment. Alienation or disconnectedness provides the basis for breach of social norms. These sentiments were clearly expressed in a gardening column in the *Times on Sunday*:
>
> > 'Sow the seed of anti-vandalism
> >
> > 'The biggest, single headache when planting trees and shrubs on nature-strips or other places where there is pedestrian traffic is vandalism. Trees are either ripped out of the ground or, if they are too big for this, branches are broken off. I've seen shrubs which have been jumped upon or torn up and thrown into the road for no apparent reason.
> >
> > 'To come across this meaningless devastation fills me with a bewildered rage for hours afterwards and, if the planting which had been destroyed was my own work, I actually feel a terrible physical pain.
> >
> > 'I remember talking to a landscaper in Britain a few years ago. He told me how six people had worked for three weeks planting 500 trees in a new park extension. The day after the planting had been completed, a twelve-year-old boy ripped the lot out in about three hours. Not content with dragging the trees out of the ground, the boy gave each rootball a couple of good kicks. Without soil, most of the trees were too dried-out the next day to be of any value. When asked why he did it, the boy just shrugged and gave no explanation.
> >
> > 'A year or so ago, I planted about 1,000 trees in heavy clay soil not far from a high school. Every day about six or seven plants were pulled out and tossed into an adjoining roadway. One day more than 100 were destroyed, so I decided to do something. I came back during the evening and sat in my ute, watching.

'The first night was enough. I saw a group of 14-year-old boys strolling through the newly planted trees. They were pushing and shoving, in the way quite normal for boys of that age group; but one of them was pulling out my lovely trees in order to throw them at his mates. He didn't see me as I made my way across and walked up behind him but his mates did. They stopped to watch.

'He was about to throw another tree when I asked him, without anger, why he was destroying my work. He looked at the tree in his hand with amazement. He said he didn't know why he was doing it. He seemed genuinely puzzled. I pointed out that I had been planting these trees over the previous week or so in order to create a wind-break which would benefit most of the people who used that area and he was, in effect, sabotaging the project. He replied that he didn't realise that what he was doing was wrong. He was obviously telling the truth; he didn't know any better.

'It was dark but I suggested that he help me to replant some of the trees. When he tried to do so, a major reason for his actions became clear – he had never planted anything in his life. So, by the light from my headlights, I showed him and the others how to plant trees.

'The next day he turned up after school and I think he enjoyed planting with me. He was a nice kid and I raised the question of vandalism again. He repeated that he didn't know why he did it; the trees could have been weeds or sticks of no value.

'I have come to understand that a great deal of so-called vandalism of this type is either accidental or inflicted through ignorance. It is unthinkable for a child who has learnt to plant a tree to wantonly destroy newly-planted trees.

'Children can be extraordinarily creative. A child who is taught to create never destroys and the most creative thing one can do is to plant a tree or a shrub.

Peter Cundell'

(Extract from *Children in Justice*, by O'Connor and Sweetapple, Longman Cheshire, Melbourne, reprinted in *Times on Sunday*, 26 July, 1987, Gardening, p. 35.)

Orders against parents

Section 197 of the Juvenile Justice Act enables a Court to make a compensation order against a parent of a child whose wilful failure to ensure proper care of, and supervision over, the child has substantially contributed to the child's offence. This is a salutary power, but so far no compensation order against a parent has been made. It is, of course, difficult to prove that a parent has, through want of care or supervision over a child, substantially contributed to the child's offence; and, in any event, in many instances the parent of a delinquent child does not have the means to satisfy compensation orders. Often parents of a delinquent child are themselves delinquent, and impecunious to boot. However, there have been cases where parents of offending children have voluntarily paid compensation to the victims of their children's offences. I have more than once appealed to parents, where there is no legally enforceable obligation, to accept the moral obligation to pay compensation attributable to their child's crimes, and I have reason to believe, in light of undertakings given to the Court, that such payments have been made.

Where parents of an offending child have a demonstrated capacity, whether by way of income or assets, to pay reasonable compensation to the victim of their child's crime, I would like to think that the Courts could make an enforceable order against the parents to pay compensation notwithstanding that it cannot be established that they have substantially contributed to the child's crime by their failure to exercise proper control over the child's activities. However, where no fault can be shown in the parents, the compensation payable should in fairness have a ceiling. I would arbitrarily fix the limit at $5,000.00. If a compensation order is made against a parent with a demonstrated capacity to pay, the amount should be recoverable by the person in whose favour the order is made as a debt in the Magistrates Court.

I know I have strayed into a controversial area. Nevertheless, I think the idea is worth looking at. I invite informed debate on the issue. Because of the recognised controversial nature of the issue, I make no concrete recommendation in respect of it.

General observations

I make an earnest plea for informed debate on the vexed question of juvenile crime, especially in its punitive aspects. As a precondition to informed debate, the public must not be whipped into a state of hysteria. What is required, especially from the Courts, is a measured response which will have long-term beneficial effects, and not short-term hysterical responses.

The public only hear about the 'worst case' situations. The power of the press is great. Generally, the public know no more than what the press tells them. The plain fact is that about 95 per cent of cases proceed through the criminal justice system normally – that is to say, within acceptable public perception parameters. The public cannot be expected to have a proper perception of a particular case if the press reports only the sensational aspects of it. Fair and balanced media reporting of cases is essential to a proper public understanding of those cases. This, I am sorry to say, does not always happen: hence the public get a distorted view of a particular case. But that is not to say that Judges do not err in judgment. Occasionally, they do. No one is infallible. As Jacob Bronowski said in *The Ascent of Man*: 'Every judgment stands on the edge of error'.

In this sensitive and difficult area of juvenile crime, I find the question of appropriate sentences most difficult to determine. There are so many considerations, including the effect on the public mind. There are so many pitfalls. The question of sentences is always difficult.

I expect the debate about juvenile crime, and crime generally, will go on unabated. I think it is a good thing that it should. However, to the ill-informed armchair critics, I trust I will be pardoned if I repeat and adopt Oliver Cromwell's exhortation:

> I beseech you, in the bowels of Christ, think it possible you may be mistaken.

6. PUBLICATION

Section 62 of the Juvenile Justice Act is a strangely titled section – it is titled 'Publication prohibited' – and yet it permits publication of a criminal proceeding against a child subject only to nothing being published which would identify the child. I set the section out in full:

> **Publication prohibited**
>
> **62.(1)** In this section –
>
> '**criminal proceeding**' means a proceeding taken in Queensland against a child for an indictable or simple offence;
>
> '**identifying matter**' means –
>
> (a) the name, address, school, place of employment or any other particular likely to lead to the identification of the child charged in the criminal proceeding; or
>
> (b) any photograph, picture, videotape or other visual representation of the child or of another person that is likely to lead to the identification of the child charged in the criminal proceeding;
>
> '**publish**' means publish in Queensland or elsewhere to the general public by means of television, newspaper, radio or any other form of communication.
>
> **(2)** A person must not publish an identifying matter in relation to a criminal proceeding.
>
> Maximum penalty (subject to Part 5) –
>
> (a) in the case of a body corporate – 200 penalty units;
>
> (b) in the case of an individual – 100 penalty units, imprisonment for 6 months or both.

The effect of the section is that, provided the identity of the child is suppressed, there is no limit on the publication of a proceeding taken against the child for an indictable or simple offence.

It will be recalled that Childrens Court Magistrates are empowered to deal with non-serious indictable offences where the child so elects and, of course, Magistrates traditionally have jurisdiction over all simple offences.

However, s. 62 of the Juvenile Justice Act must be read with s. 20 of its companion Act, the *Childrens Court Act 1992*. Section 20, entitled 'Who may be present at a proceeding', provides:

20.(1) In a proceeding before the Court in relation to a child, the Court must exclude from the room in which the Court is sitting a person who is not –

(a) the child; or

(b) a parent or other adult member of the child's family; or

(c) a witness giving evidence; or

(d) if a witness is a complainant within the meaning of the *Criminal law (Sexual Offences) Act 1978* – a person whose presence will provide emotional support to the witness; or

(e) a party or person representing a party to the proceeding, including for example a police officer or other person in charge of a case against a child in relation to an offence; or

(f) a representative of the chief executive of the department; or

(g) if the child is an Aboriginal or Torres Strait Islander person – a representative of an organisation whose principal purpose is the provision of welfare services to Aboriginal and Torres Islander children and families; or

(h) a person mentioned in subsection (2) whom the Court permits to be present.

(2) The Court may permit to be present –

(a) a person who is engaged in –

(i) a course of professional study relevant to the operation of the Court; or

(ii) research approved by the chief executive of the department; or

(b) a person who, in the Court's opinion, will assist the court.

(3) Subsection (1) applies subject to any order made by the Court under section 21A of the *Evidence Act 1977* –

(a) excluding any person (including a defendant) from the place in which the Court is sitting; or

(b) permitting any person to be present while a special witness within the meaning of that section is giving evidence.

(4) Subsection (1) applies even though the Court's jurisdiction is being exercised conjointly with other jurisdiction.

(5) Subsection (1) does not apply to the Court when constituted by a Judge exercising jurisdiction to hear and determine a charge on indictment.

(6) Subsection (1) does not prevent an infant or young child in the care of an adult being present in Court with the adult.

'Court' means the Childrens Court.

Subsection (5) exempts from the provision of subsection (1) a Childrens Court when constituted by a Judge trying an indictable offence. The effect of s. 20 is that a Magistrate conducting a Childrens Court must exclude from the Court for the whole of the proceeding all persons except the special categories of persons mentioned in subsection (1) and may permit to be present the persons mentioned in subsection (2). The result is that a Magistrate's Childrens Court is not open to the public. Put another way, it is a closed Court. But notwithstanding this exclusion of the public from a Childrens Court presided over by a Magistrate, publication of a proceeding in that Court is permitted pursuant to s. 62 of the Juvenile Justice Act provided no 'identifying matter', i.e. anything identifying the child, is published.

It seems to me that s. 62 of the Juvenile Justice Act and s. 20 of the Childrens Court Act do not sit comfortably together. I find it difficult to reconcile the two sections. The question arises, how can there be publication of a Childrens Magistrates Court proceeding when the press is expressly excluded from the proceeding?

Whilst acknowledging that there may be public-interest reasons why certain judicial proceedings should not be exposed to publicity, I think that in this day and age the idea of closed Courts runs counter to the public notion of open justice.

There should be a consistent policy about the publication of Childrens Court proceedings. Why should a distinction be drawn between proceedings conducted by a Magistrate and proceedings conducted by a Judge? I can see no reason in principle for such a distinction. For myself, I have an aversion to secret or closed Courts. This view is not idiosyncratic. It is held by a body of respectable professional opinion. The 19th-century jurist Jeremy Bentham put the matter in a nutshell when he wrote:

> Publicity is the very sole of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the Judge himself while trying on trial.

In *Russell v. Russell* (1976) 134 CLR 520, Gibbs J (as he then was) put the same proposition dressed in somewhat different language:

> It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' (*Scott v. Scott* (1913) AC 417 at 441; (1911–13) All ER 1 at 11). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'.

And the great Lord Denning had this to say:

> In every court in England you will, I believe, find a newspaper reporter...He notes all that goes on and makes a fair and accurate report of it...He is, I verily believe, the watchdog of justice...The judge will be careful to see that the trial is fairly and properly conducted if he realises that any unfairness or impropriety on his part will be noted by those in court and may be reported in the press. He will be more anxious to give a correct decision if he knows that his reasons must justify themselves at the bar of public opinion. Justice has no place in darkness and secrecy. When a judge sits on a case, he himself is on trial...If there is any misconduct on his part, any bias or prejudice, there is a reporter to keep an eye on him.
>
> (From *The Times*, 3 December, 1964).

I recognise that one has to strike a balance between the public's right to know what is happening in the Courts of the land and the protection of children in criminal trouble from the glare of publicity. It seems to me that s. 62 affords the protection that children should have: their identity must not be published.

As I have pointed out in my Symposium Paper (quoted ante) under the rubric 'Age of criminal responsibility', the law of Queensland is that there is an irrebuttable presumption that a child under 10 years is not criminally responsible and there is a rebuttable presumption that a child under 15 years is not criminally responsible. In the case of children aged between 10 and 14 the presumption may be rebutted if the prosecution can prove that at the time of doing the act the child knew that what he was doing was wrong. In most cases this is not difficult to prove.

I think there is a compromise solution to the opposing points of view about publicity of Magistrates Childrens Court proceedings. The suggestion I make is that in a Childrens Court constituted by a Magistrate, for a child over 10 and under 15 years of age, the closed Court rule be preserved (*Childrens Court Act 1992*, s. 20), but for children aged 15 to 17 years publication of proceedings be permitted subject to the constraint on the publication of any 'identifying matter' (*Juvenile Justice Act 1992*, s. 62). I recommend that the Acts be amended to give effect to this suggestion.

Associated with the right to publish juvenile Court proceedings is the need to have school children regularly attend juvenile Courts, especially at Judge level. I was recently invited to write an article on Juvenile Justice to be published in a Queensland Law Society sponsored Journal, *The Broker*. The journal is published for the information of Queensland schoolchildren and TAFE colleges on current legal issues. In the article, amongst other things, I said this:

> Provided nothing is published which would identify the child, his family or his school, publication of proceedings before a Childrens Court Judge is permitted. A Childrens Court, presided over by a Childrens Court Judge, is an open court. Any member of the public may attend. Schoolchildren, in particular, are invited to attend to witness first-hand the tragedy and pathos inherent in child crime. Attendance at such proceedings is a practical lesson in juvenile justice for which theoretical study is but a poor substitute. Attendance at juvenile courts (and other courts) should be included in the school curriculum for all children over ten years of age, ten being the age of criminal responsibility fixed by law.

This is a view I strongly hold. The Courts have an educative role. It has got to do with letting the public know.

The summary procedures of Childrens Courts are sometimes defended on the basis that it is the law's policy to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past. This claim of secrecy, however, is more rhetoric than reality.

In a recent address to the Law Society of the Australian Capital Territory the Chief Justice of the Federal Court of Australia, Justice Black, said:

> The Courts have a role to play – a very important role – in the processes by which the community can be assisted to have a better understanding of

> our system of justice, of the functions of the Courts and the way in which they work, and the values our system of justice seeks to uphold. There can be no doubt about the importance of informing the public about our system of justice or about the need for that task to be undertaken...The present unprecedented level of critical interest in the system of justice in this country should, in my view, be seen as providing an excellent opportunity to promote a much better understanding of the system.

The Chief Justice of South Australia, Justice King, at the 1991 Australian Legal Convention said:

> The only guarantee of the continued survival of the Court system is the support of an informed public opinion...If the public is apathetic or antagonistic, the foundations which underpin the independent judicial system are in danger of being eroded.

And in 1992 Mr Justice McGarvie (now Governor of Victoria) observed:

> There is a great paradox in the Australian judicial scene today. While opinion is unanimous that the judicial system must have the confidence of the community and that its real, as distinct from its formal, authority comes from that confidence, practically nothing is done to provide the public with the information from which that confidence would grow.

I recommend that attendance at Childrens Courts be included in the State School curriculum for all children over the age of 10 years. To facilitate the implementation of this recommendation there should be appointed liaison officers from the Education Department and the Department of Justice and Attorney-General.

7. CAUTIONING

In my inaugural address I made commendatory mention of the cautioning provisions of the Juvenile Justice Act. Before police officers decide whether a caution would be appropriate, they should have regard to, *inter alia*, the circumstances of the alleged offence and the child's previous history. The legislation nowhere says that a police officer should never administer a caution for an indictable offence. In other words, the legislation does not restrict cautions to trivial or minor offences.

While on circuit in Mt Isa in February 1994, I made inquiries of the head of police for the Mt Isa district and was informed that for the period 1 September 1993 to 31 January 1994 the following cautions had been administered to juveniles in the Mt Isa district:

Break and enter	17
Steal	14
Wilful damage	7
Unlawful use of a motor vehicle	5
Dangerous driving	2
Assault	2
Drug	5
Good order	3
Traffic	2

After speaking to the officer in charge of cautioning in Mt Isa I was, on the whole, satisfied that the cautions were appropriately administered.

FREQUENCY OF CAUTIONING

Until very recently I found it difficult to obtain accurate information in the form of police-service statistics or anecdotal evidence as to how frequently cautioning is being availed of by the Queensland Police Service on a state-wide basis. However, on 24 August 1994 I requested the Commissioner of Police, Mr O'Sullivan, to furnish me with statistical information about police cautioning of juveniles since the Juvenile Justice Act came into force on 1 September 1993. Within 24 hours Mr O'Sullivan caused the information to be forwarded to me. I am grateful to him for the alacrity with which the request was met and the efficiency with which the statistics have been compiled.

The statistics are very revealing indeed. I set them out in full hereunder for the 10–17 age groups:

Table 1 **Offences against the person – Offenders proceeded against by caution, offence by age, Queensland, 1 September 1993 to 26 August 1994**

Offence Category	10–14 years	15 years	16 years	17 years
TOTAL OFF. AGAINST THE PERSON	416	195	152	1
Homicide	0	0	0	0
Murder	0	0	0	0
Attempted murder	0	0	0	0
Conspiracy to murder	0	0	0	0
Manslaughter (exc. MV)	0	0	0	0
Driving causing death	0	0	0	0
Assault (excluding sexual)	287	144	99	1
Serious assault	113	61	48	1
Minor assault	174	83	51	0
Sexual offences	92	30	33	0
Rape and attempted rape	0	1	0	0
Other sexual offences	92	29	33	0
Robbery	12	8	1	0
Armed robbery	2	0	0	0
Steal with violence	10	8	1	0
Extortion etc.	5	0	3	0
Kidnap, abduct, etc.	0	0	0	0
Other off. against person	20	13	16	0

Table 2 **Offences against property – Offenders proceeded against by caution, offence by age, Queensland, 1 September 1993 to 26 August 1994**

Offence Category	10–14 years	15 years	16 years	17 years
TOTAL OFF. AGAINST PROPERTY (excl. miscellaneous offences)	5425	2676	1828	11
Breaking & entering	1032	957	328	2
Dwellings	306	146	106	1
Shops	201	264	86	0
Other premises	525	547	136	1
Arson	11	5	3	0
Other property damage	646	315	328	1
Motor vehicle theft etc.	143	116	101	0
Stealing (exc. MV)	3415	1218	986	8
From dwellings	160	40	44	1
Shop stealing	2448	838	563	5
Stock stealing etc.	6	0	0	0
Other stealing	801	340	379	2
Total fraud etc.	177	64	79	0
By cheque	4	2	2	0
By credit card	1	11	3	0
Other fraud etc.	172	51	74	0
Other off. against property	1	1	3	0
Miscellaneous offences	90	56	50	0

Table 3

Other offences – Offenders proceeded against by caution, offence by age, Queensland, 1 September 1993 to 26 August 1994

OFFENCE CATEGORY (excl miscellaneous offences)	10–14 YEARS	15 YEARS	16 YEARS	17 YEARS
Handling stolen goods	**133**	**55**	**45**	**0**
Poss.prop.suspected stolen	3	1	5	0
Receiving	130	54	40	0
Drug offences	**489**	**385**	**493**	**8**
Trafficking	0	0	0	0
Possession dangerous drugs	284	206	251	4
Produce dangerous drugs	27	23	33	0
Supply dangerous drugs	71	43	35	0
Other drug offences	107	113	174	4
Prostitution	**0**	**0**	**0**	**0**
Found in places used for	0	0	0	0
Have interest in premises	0	0	0	0
Knowingly participate in	0	0	0	0
Public soliciting	0	0	0	0
Procuring prostitution	0	0	0	0
Permit minor to be at place	0	0	0	0
Advertising prostitution	0	0	0	0
Other prostitution offences	0	0	0	0
Liquor (excluding drunkenness)	**10**	**14**	**46**	**2**
Gaming	**2**	**0**	**0**	**0**
Racing and betting	1	0	0	0
Vagrancy	1	0	0	0

cont'd

Table 3 *Continued*

Good-order offences	19	9	22	0
Indecent behaviour	1	1	3	0
Language offences	1	0	2	0
Disorderly conduct	6	1	6	0
Resist, hinder etc.	2	1	3	0
Evade taxi fare	1	3	5	0
Evade rail fare	8	3	3	0
Stock-related offences	**0**	**0**	**0**	**0**
Possess skin, carcass	0	0	0	0
Branding offences	0	0	0	0
Other stock offences	0	0	0	0
Traffic and other related offences	**4**	**2**	**8**	**0**
Dangerous driving	2	1	2	0
Drink driving	1	1	3	0
Disqualified driving	0	0	0	0
Interfere with mechanism of MV	1	0	3	0
Other driving, MV offences	0	0	0	0
Miscellaneous offences	**49**	**42**	**40**	**0**

It is clear that cautioning is being liberally used, not only for simple offences but also for indictable offences.

For the period 1 September 1993 to 26 August 1994 (about one year) 9940 cautions were administered to juveniles aged 10 to 17 for offences against property. This is a staggering number. The breakdown indicates as follows:

A total of 2319 cautions were administered for break-and-enter offences: 1032 to the 10–14 age bracket, 957 to 15-year-olds, 328 to 16-year-olds and 2 to 17-year-

olds. A total of 360 cautions were administered for motor vehicle theft etc. offences: 143 to the 10–14 age bracket; 116 to 15-year-olds and 101 to 16-year-olds.

A further 764 cautions were administered for offences against the person. By way of illustration, 2 were for armed robbery, 19 for stealing with violence, 223 for serious assaults and 308 for minor assaults.

In my opinion the generous use of cautioning reflects creditably on the Police Service. The Police Service have entered into the spirit of cautioning in accordance with the parliamentary intendment as enacted in the Juvenile Justice Act. I think it is reasonable to deduce from police cautioning practices that they have generally adopted a benevolent attitude to youthful first offenders and have concentrated their main effort on prosecuting persistent offenders. Subject to my recommendations as to the use which should be made of cautions for repeat offenders, this is as it should be.

It may concern some people that cautions are being administered for indictable offences. However, to cite but two examples, a child may be guilty of housebreaking but the circumstances may be that he caused no physical damage to property and stole a loaf of bread or a bottle of soft drink; or a child may be guilty of the unlawful use of a motor vehicle by going for a joyride as a passenger with a person who unlawfully took the car. In these cases, if the child had not come under the adverse notice of the police before, a caution may not be inappropriate.

Drawbacks of Confidentiality

But having given my general approbation to cautioning in appropriate circumstances, I should sound a note of warning.

Under the legislation, if a child is cautioned, the caution cannot be used for any purpose whatsoever against the child in the future. Should the child reoffend, the sentencing Court is not entitled to know that a caution has been administered for an offence previously committed by the child. As a condition precedent to the administering of a caution, the child must admit the commission of the offence.

Certain consequences flow from the confidentiality attaching to cautions (s. 18). One is that a sentencing Court, when sentencing for a subsequent offence, cannot be informed of the offence for which the child was cautioned (s. 113). Another is that the victim of an offence cannot be informed that the offender admitted guilt and was cautioned, unless the police officer requires the child to apologise to the victim of the offence as a term of the caution, in which event the child must be willing to apologise and the victim must be willing to participate in the procedure (s. 16). Moreover, a victim who has suffered either personal injury or property damage as a result of an offence committed by a child for which a caution was administered cannot be the beneficiary of a restitution or compensation order under the Act; nor can the victim make use of the facilitating enforcement provisions (ss. 122, 192, 231).

Before the sections referred to can be invoked, a child must have been 'found guilty' of an offence 'by a Court'. A caution does not, of course, involve a finding of guilt of an offence by a Court. In my view, if there is significant personal injury or property damage caused to the victim of an offence allegedly committed by a child, then a caution would not be appropriate.

The Police Service has drawn my attention to a number of undesirable, and perhaps unforseen, consequences of the strict confidentiality provisions of the Act (ss. 18, 226). Subject to the very limited exception set out in s. 18(2), a member of the Queensland Police Service is not to give a person who is not a member of the service information in any form that is likely to identify the child as a person to whom a caution is to be, or has been, given.

Take, for example, the schoolboy who breaks and enters his school. No damage is caused. Nothing of value is stolen. The boy has no criminal history. A caution is administered. The offence of breaking and entering, it should be noted, is an indictable offence. On a strict application of the confidentiality provisions, whilst the parent of the child can be informed of the caution, the school principal cannot. Can this be right? I think not.

Take another example. A child unlawfully uses a motor vehicle. He uses it to joyride. No damage is done to the vehicle. However, in the course of driving the vehicle, he commits a traffic offence. He is aged 16. He has no criminal history. Cautions are administered for both offences. Before long the child will be eligible

to apply for a driving licence. Should the Transport Department be entitled to be informed about the cautions? May not the child's offending be relevant to the grant of a licence? Similar instances can be multiplied.

Revealing criminal history after 17 when no convictions recorded

This brings me to a much more complex and controversial issue, and that is, should cautions be included in a child's criminal history? Section 113 of the Juvenile Justice Act provides that:

> **(1)** A finding of guilt against a child by a court for an offence, whether or not a conviction has been recorded, is part of the criminal history of the child to which regard may be had –
>
> (a) by a court that subsequently sentences the child for any offence as a child; or
>
> (b) by any person or court whose duty it is subsequently to consider whether or not the child should be remanded in custody or released pending any proceeding in which the child is being dealt with for an offence as a child.
>
> **(2)** Subsection(1) applies despite the *Criminal Law (Rehabilitation of Offenders) Act 1986*.

Section 114(1) of the Act provides that:

> In a proceeding against an adult for an offence, there must not be admitted against the adult evidence that the adult was found guilty as a child of an offence if a conviction was not recorded.

I must say s. 113 is a most sensible provision. Under the provisions of the Childrens Services Act, which are substantially repealed by the Juvenile Justice Act, if a Court ordered that no conviction be recorded against an offending child, a Court was forbidden to be informed of that fact in the event of the child reoffending while a child. Both under the old juvenile sentencing regime and under the new sentencing regime, Courts are more disposed not to record convictions against juvenile offenders than they would be if the offenders were adults. The reason is, of course, that, as a general rule, a greater compassion and a broader humanity is shown towards youthful offenders, especially those who are

not persistent offenders. In other words, youth of itself is generally a mitigating factor.

Section 125 of the Juvenile Justice Act provides that:

> (1) In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including –
>
> (a) the nature of the offence; and
>
> (b) the child's age and any previous convictions; and
>
> (c) the impact the recording of a conviction will have on the child's chances of –
>
> (i) rehabilitation generally; or
>
> (ii) finding or retaining employment.
>
> (2) Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose.

This section is similar to s. 12 of the *Penalties and Sentences Act 1992*, which provides a sentencing regime for adult offenders (i.e. offenders over 17 years of age).

The effect of s. 113 of the Juvenile Justice Act is that a sentencing Court has the benefit of the whole criminal history of the child. Nothing is held back or concealed from the Court. In my view, it is impossible to sentence appropriately or effectively if the Court is blindfolded as to aspects of the child's past offending. Because of the terms of s. 113, Childrens Courts are more disposed not to record convictions for certain types of juvenile offences and offenders. This beneficent attitude does not handicap the Court when sentencing a repeat juvenile offender: all is revealed. And this is as it should be.

But once a child turns 17 – that is, crosses the border between childhood and adulthood – the slate is wiped clean for all purposes so far as childhood offences for which no convictions have been recorded are concerned. This is a policy decision which Parliament took when enacting the legislation. There are some who would question the wisdom of it. It should be pointed out that under the *Penalties and Sentences Act 1992* a conviction without recording a conviction has

the same result as if a conviction had been recorded for the purpose of proceeding against an adult offender for a subsequent offence. If the offender is convicted of the subsequent offence, the Court may disregard a conviction which was ordered not to be recorded (s. 12(4) and (5)).

Under the Juvenile Justice Act, where a child is found guilty of a serious offence and the Court makes a sentence order under s. 121 (serious offences) which is not allowed under s. 120 (sentence orders – general), a conviction is taken to be recorded. Simply put, this means that, if a Childrens Court Judge or a Court of competent jurisdiction sentences a child to more than two years detention or more than two years probation, a conviction is automatically recorded; otherwise the option exists to record or not record a conviction.

Recommendations

My mind has fluctuated on the efficacy of the prohibition on a Court when dealing with an erstwhile juvenile offender as an adult to be informed of the person's offending as a juvenile if no convictions were recorded for the juvenile offences. After much anxious consideration, I have concluded that s. 114(1) of the Juvenile Justice Act, which proscribes the use, against a child offender who has grown to adulthood and transgressed as an adult, of his criminal history as a child, except for those offences for which convictions have been recorded, is too liberal and not in the public interest. My opinion is that, if a person has been found guilty of two or more indictable offences as a child for which convictions were not ordered to be recorded and the offences are of a type that, if committed by an adult, would make the adult liable to imprisonment for seven years or more, then that part of his juvenile criminal history should be revealed to the Court when sentencing the person for an offence committed by him as an adult.

I take the view that a sentencing Court should not be made to sentence an offender (whether a juvenile or an adult) with its eyes bandaged. The non-recording of a conviction is a concession made to an offender. The concession is usually predicated on the assumption that the child will take advantage of the concession conferred on him and refrain from reoffending. If he continues to seriously reoffend, I wonder whether he should still be entitled to the benefit of that concession. There are at times public interest considerations which outweigh and override predominantly personal considerations.

Justice is symbolically depicted as a woman blindfolded with a sword in her right hand and lifted scales in the other. The blindfold is intended to signify impartiality and lack of prejudice. The sword is the symbol of authority by which the law is enforced. The sword of justice is the sword of State. The scales are the symbol of even-handed justice. Lord Denning questioned the good sense of representing justice as blind. In *Jones v. National Coal Board* [1957] 2 QB 55, 64, he said:

> It is all very well to paint justice blind, but she does better without a bandage around her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth and the less dust there is about the better.

You will be interested to know that Themis, the symbol of justice in the courtyard of the Supreme Court, has the bandages removed from her eyes.

With regard to cautions, I think that, if a child has been cautioned for an indictable offence which would attract seven or more years imprisonment by way of punishment if he were an adult, the caution should be revealed to the Court if the child subsequently reoffends as a child, but not as an adult. And I so recommend. Section 113 of the Juvenile Justice Act should be amended to effectuate this recommendation. If the recommendation is not adopted, it is likely that police will be reluctant to caution for indictable offences; they will restrict cautioning to minor infractions of the criminal law. And that will tend to defeat or at least limit the purpose of the cautioning provisions of the Act.

I also recommend that the victim of an offence committed by a child be entitled to be advised of the outcome of the offence involving the victim, if the victim so requests.

And I further recommend that, at the discretion of the Commissioner of Police, Departments and agencies which have a relevant interest in the matter be advised of a caution administered to a child.

Section 19 of the Juvenile Justice Act is, in my opinion, a problematic section. It provides that:

> **19.(1)** If a child pleads guilty before a Childrens Court to a charge made against the child by a police officer, the court may dismiss the charge instead of accepting the plea of guilty if –

(a) application is made for the dismissal by or on behalf of the child; and

(b) the court is satisfied that the child should have been cautioned instead of being charged.

(2) In determining the application, the Childrens Court may have regard to any other cautions administered to the child for any offence.

If a charge is dismissed under this provision, then technically the police are powerless to caution the child. I have reservations about the efficacy of s. 19. I would recommend its repeal.

Section 17 of the Act provides that, if a caution is administered to a child, the police officer who administers the caution must give the child a certificate of caution in a form to be approved by the Commissioner of Police. I am informed that there have been instances where the recipient of such a certificate brandishes it about as it if were some sort of certificate of merit. The term 'certificate' bears a connotation associated with creditable accomplishment. To avoid certificates of caution being misused, I recommend that the term 'notice' be substituted for 'certificate'.

In my opinion, cautioning, sensibly administered, will, on balance, be productive of more good than harm, and should be encouraged. Happily, most juvenile crime is not serious, not repetitive, and not predictive of future criminal careers.

I think the present practice of an 'authorised officer' administering cautions for both trivial and indictable offences should be reviewed. In my opinion, cautions for indictable offences should be administered by an officer of at least the rank of Inspector. In the metropolitan area I would like to see a committee of three officers of the rank of Superintendent or above administer cautions to children guilty of indictable offences. The solemnity of the occasion would tend to impress on the child's mind the significance of his wrongdoing. With the caution should go a warning that, should the child reoffend, he will be dealt with by a Court of law. In country stations where there are no commissioned officers the most senior officer available at the station should administer the caution. And I recommend accordingly.

Section 14 of the Act provides that, if an Aboriginal or Torres Strait Islander child is to be cautioned, the police officer may request a recognised elder of the

community to administer the caution. In my opinion, there is an element of condescension implied in the section. Every Aboriginal and Torres Strait Islander community should have a list of at least three approved elders or respected persons who, as of right, should administer cautions. Statutory recognition should be given to elders and respected persons to administer cautions to children of their communities in appropriate cases; that is to say, the police officer 'must', not 'may' request an elder or respected person to administer the caution.

8. PARENTAL PARTICIPATION

A thread running through the Juvenile Justice Act is the involvement of parents of a child in all stages and phases of the procedures and proceedings leading up to and including the prosecution of the child for an offence.

If a child is arrested for an offence, a parent of the child must promptly be advised unless the parent cannot be found after reasonable inquiry (s. 22). For example, if, instead of arrest, proceedings against a child are started by the service of an attendance notice or a complaint and summons, the parent of the child must be promptly advised (ss. 28, 32). The 'election' provisions of the Act require that a parent of the child who is present in Court should have explained to him or her the child's right of election to be dealt with by a Childrens Court Judge or a Court of competent jurisdiction or, where appropriate, to be dealt with summarily (ss. 70–84).

When a caution is being administered to a child there should be present a parent of the child or a person chosen by the child or a person chosen by the parent of the child (s. 13). A Court may release a child without bail into the custody of a parent (s. 42).

Of particular relevance are ss. 56–58 of the Act. Section 56 provides that if a parent of a child is not present when the child appears before it charged with an offence, the Court, after due inquiry as to the whereabouts of the child's parents, may adjourn the proceeding to enable a parent to be present at the time and place of the adjourned proceeding, and may recommend that the Department of Family Services provide financial assistance to a parent of the child to ensure that a parent is present at the proceeding.

If the proceeding is conducted and concluded adversely to the child in the absence of a parent and the parent satisfies the Court by application within 28 days of the conclusion of the proceeding that he or she was unaware of the time and place of the proceeding or, if aware, was unable to attend for sufficient reason, the Court may set aside the finding or order made against the child and grant a rehearing of the proceeding if it considers that it is in the interests of justice to do so, for example if it considers that the child's capacity to make an election or other decision relating to the proceeding was adversely affected.

Section 58 provides that, in a proceeding before a Court in which a child is charged with an offence, the Court must take steps to ensure that, as far as

practicable, the child and any parent of the child present have full opportunity to be heard and participate in the proceeding.

It is apparent from the above review of the relevant provisions of the Juvenile Justice Act that a Court has no legal coercive power to force parents to attend. However, parents of offending children are encouraged to be present at all Court proceedings involving their child. If parents are not present, the Court should seek an explanation for their absence and may adjourn the proceeding to enable the parents to be present at the time and place to which the proceeding is adjourned.

I have myself placed great importance on the presence of both parents, or at least a parent, of the offending child in Court so that they may witness the proceeding and actively participate in the ultimate disposition of the case. The Act stops short of empowering the Court to compel the attendance of recalcitrant parents of offending children. Notwithstanding this lack of legal power to compel attendance, I have repeatedly exercised what I might term, for want of a better phrase, 'moral coercion' to shame reluctant parents to attend proceedings involving their children. It has most times worked.

I have a strong belief bordering on the obsessive that parents of an offending child should be confronted with their child's criminality in the formal Court setting where they will hear, often for the first time, invariably shocking, detailed evidence of their child's criminal conduct. The result is almost universally salutary.

Recomendations

In my opinion, there should be power to compel attendance of a parent in a case where the Court is satisfied on reliable evidence placed before it that there are reasonable grounds for believing that the parent has neglected the child or has failed or refused without good cause to exercise proper parental control over, or responsibility towards, the child. In that event, the Court should be empowered to cause the proper officer of the Court to give written notice to the parent requiring the parent to attend the Court as directed in the notice and, in default of attendance without reasonable excuse, the parent should be considered to be in contempt of Court; and I recommend accordingly. Section 249 of the Juvenile

Justice Act affords a Childrens Court Judge the same power to punish a person for contempt of Court as is provided for in s.105 of the *District Court Act 1967.*

It should be pointed out that the term 'parent' is afforded a wide definition. It means:

(a) a parent or guardian of a child; or

(b) a person who has lawful custody of a child; or

(c) a person who has the day-to-day care and control of a child (s.5).

If a parent of an offending child has not for any reason been able to attend the Court proceeding, I have encouraged the attendance of a member of the child's extended family and have afforded that person the same opportunity to which a parent is entitled to be heard and to participate in the proceeding.

As the Act does not impose on any party to the proceeding the responsibility of ensuring that a parent of a child is advised of the time and place of the proceeding involving the child, I have given an informal direction that the Department of Family Services should assume that responsibility. I would like to see statutory recognition of this direction. Indeed the Department of Family Services should not only take on the responsibility of advising a parent of the proceeding, but it should ensure, as far as practicable, that transport is provided for a reluctant or impecunious parent from his or her home to the Court and return.

The Chief Executive of the Department or his or her delegate is entitled to be heard by the Court in relation to a proceeding involving a child. This is a very good measure. I have from time to time derived invaluable assistance from the Department representative. And the quality of pre-sentence reports when ordered has been generally of a high standard. I have to say, however, that some officers at times let benevolence override realism when recommending the appropriate disposition of the case. By that I mean occasionally the officer expresses a preferred sentence option which in all the circumstances of the case betrays an abundance of benevolence but a lack of realism. These remarks are not made in any critical sense. On the whole, the Department performs a very important function well under extremely difficult conditions. There are a number of dedicated and able officers who have rendered valued assistance to the Court. To them I express my sincere gratitude.

9. PROCEDURES ADOPTED

Juvenile criminal proceedings are conducted in a formal Court setting. I did, at the outset, give consideration to discarding formal Court regalia and appearing in civilian dress, but in the end I decided that a 'beneficent' authoritarian atmosphere was to be preferred. I go into Court robed but not wigged. Counsel robe. Whilst I respect the views of those who sincerely believe that juvenile Court proceedings should be conducted in an informal atmosphere, I cannot myself accept that informality of atmosphere is conducive to the best result. Children, I have found, understand, subconsciously perhaps, the symbolism associated with an aura of authority. Criminous children should be made to realise the solemnity of the occasion. I have therefore refrained from embracing soppy sentimentality in the conduct of the juvenile Court. That is not to say I have discarded compassion, humanity and a 'wise and understanding heart' in judging offending children. As I said in my Symposium Paper (reproduced ante), 'the most important quality which a juvenile Court Judge must possess is a wise and understanding heart'.

Although the proceedings are conducted in a formal Court setting, many of the procedures I have adopted are informal. I endeavour to conduct a relaxed Court. The procedures I adopt are designed to engender respect for, rather than fear of, the Court and the law which it administers.

The child is not placed in the criminal dock, as is the case with an adult. The child is seated with his Counsel at the Bar Table, and his parents, if present, are seated behind him. The Court invites the child and his parents to participate in the process by making submissions on their own behalf. This practice has proved very beneficial indeed. Also present in the Court is a representative of the Family Services Department, whose function is to assist the Court and ensure that the welfare of the child is safe-guarded.

I sometimes bring children onto the Bench and speak to them about themselves, their crimes, their fears and their hopes for the future.

I have been pleasantly surprised with the outpourings of children and parents when invited to tell the Court their side of the story. I have placed virtually no restraint on what the child or his parents can say.

The child often explains informally his position more revealingly and helpfully than the more formal exposition of his case by his barrister, and, surprisingly, the

parent not uncommonly informs the Court of a facet of the child's make-up and the family history which casts a new light on the case. The full, free and informal participation of child and parent in the juridical process is of such vital and fundamental importance in achieving a just outcome of the case that I will now openly confess that but for that participation the disposition of a particular case might have been different.

Let me give an example. The prosecution paints a black picture of the child's criminality. The child has been involved in serious crime. The child's barrister pleads in mitigation. The Department representative often urges moderation of penalty. The child then comes out and accepts full responsibility for what he has done and says he is sorry. The parent of the child persuades the Court that the child will in future live at home and be properly supervised. The Court at this point has to form an impression of the character of the child and his parent assisted, by such information as is forthcoming from the Department representative and the child's barrister, and has to make a decision. Will the Court play safe and order detention as it was first minded, or will it relent, take a calculated risk and order probation and perhaps community service as well? Judgments of this kind impose an enormous strain on the Court. But a decision has to be made. The Court cannot sit on the fence.

Speaking purely subjectively, and with the utmost candour, I have at times found the information imparted by the child and his parents in their own words the turning point in the decision-making process.

If a non-custodial sentence is the final outcome, before ordering probation and/or community service I speak to the child and warn him in strong and unmistakable language that, should he seriously reoffend during the probation period, he will, unless exceptional reasons exist, be sentenced to a period of detention for the probation-given offences. In other words, I painstakingly explain to the child that, if he does not grasp the chance he has been given, he will not be extended leniency again. I refuse to hurry the sentencing process. I search and probe for the best possible outcome. An average sentence takes about an hour. Some more complicated ones take up to half a day.

Although it is too early to make any confident prediction (the Act has been in force only since 1 September 1993) up to the time of writing this report, out of

the numerous probation orders made so far two only have returned for breaching their probation orders by subsequent serious offending. Each was sentenced to detention.

I should, of course, make it clear that, in the case of persistent serious offenders and especially those who have previously been given the benefit of probation, detention is usually ordered. The course outlined above applies generally to a child with either no or only a minor criminal history. However, there are exceptional cases where the general rule is departed from, but they are rare.

Within the framework of the Juvenile Justice Act, which is generally good, enlightened and far-sighted legislation, I have endeavoured in the first year of the operation of the new Childrens Court of Queensland to devise a model Juvenile Court, with model practices and procedures, which will hopefully gain general acceptance and in time make its mark in the management and control juvenile crime. About this, I have an optimistic outlook.

10. POWER OF ARREST

Under the Juvenile Justice Act, although the power of arrest remains in certain cases, a child will generally not be arrested for an alleged offence. Instead, he will be given what is called an 'attendance notice' or a 'complaint and summons' requiring him to appear in a prescribed court at a specified time. The intention in avoiding arrest wherever possible is to remove the child from the stigma normally attached to being taken to a watchhouse, fingerprinted, photographed and detained pending release on bail.

A police officer's power of arrest of a child contained in s. 20 of the Juvenile Justice Act is restricted to:

(a) a life offence;

(b) a belief on reasonable grounds that arrest is necessary –

(i) to prevent a continuation or a repetition of the offence or the commission of another offence; or

(ii) to prevent concealment, loss or destruction of evidence relating to an offence; or

(c) a belief on reasonable grounds that the child is unlikely to appear before a Childrens Court in response to a complaint and summons or an attendance notice.

Although I think the power of arrest is probably sufficient, I can see no reason in principle or in fact why it should not be extended to cover a serious offence as defined by the Act. The present definition of a serious offence covers a life offence and an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for fourteen years or more. Earlier in this report I recommended that 'serious offence' be redefined to mean a life sentence or an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for seven years or more. I recommend that the power of arrest contained in s. 20 of the Juvenile Justice Act be extended to cover a 'serious offence' as defined by the Act (or the recommended redefinition thereof).

Service of attendance notices and complaints and summonses have, I am informed by the Police Service, created problems. Section 28 provides that, as well as serving an attendance notice on the child, the police officer must promptly advise the parent of the child unless a parent cannot be found after reasonable inquiry. On the other hand, if proceedings are initiated by complaint

and summons, both child and parent must be served (s. 32(1)). I recommend that s. 32(1) be amended to provide that, consistent with the requirements of service of an attendance notice on a parent, a complaint need not be served on a parent if the parent cannot be found after reasonable inquiry.

11. SENTENCE REVIEWS

Without derogating from the right of appeal afforded under the Criminal Code or the *Justices Act 1866*, the Appeal and Review Division of the Juvenile Justice Act allows an alternative type of appeal called a sentence review. A Childrens Court Judge, on application, may review a sentence order made by a Childrens Court Magistrate (s. 88). The right to apply for a sentence review is, however, restricted to a child and the Chief Executive acting in the interests of a child. The prosecution is excluded from applying for a sentence review to a Childrens Court Judge. It seems to me that this imbalance in the right to seek a sentence review should be rectified by giving the prosecution an equal right to apply; and I so recommend. Sentence-review procedures are simple and expeditious, and therefore cost-saving.

12. *Ex officio* Indictments

The Juvenile Justice Act seems to contemplate matters coming to a Childrens Court Judge only through committal proceedings. Not infrequently, committal proceedings are circumvented by the presentation of an *ex officio* indictment. It is at committal that the right of election is exercised. The Act should make provision for election when proceedings are commenced by *ex officio* indictment; and I recommend accordingly.

13. PRE-SENTENCE REPORTS

Under the Juvenile Justice Act it is a condition precedent to ordering detention of a child that the Court request a pre-sentence report on the child (ss. 110, 164). The report should be furnished within fifteen days.

In practice, delays have been encountered in the preparation and furnishing of pre-sentence reports. Delay can often impact adversely on the child whose sentencing fate is left in a state of suspension pending the receipt of the pre-sentence report.

I think that, at juvenile case callovers, when hearing dates are assigned for cases, the children involved should appear, be arraigned and enter a plea. In obviously bad cases, where almost inevitably the Court will request a pre-sentence report, the Family Services Department should anticipate such request and come prepared with a pre-sentence report on the date assigned for hearing. This procedure, if adopted, will avoid the present undesirable consequence of interrupting the impetus of proceedings by adjourning the case to obtain a pre-sentence report.

I am giving consideration to issuing a practice direction to overcome this difficulty.

14. Detention Centres

In my inaugural address I expressed the hope that detention centres would be places of learning, enlightenment and discipline, and I undertook to make periodic visits to detention centres to inform myself of their standards and utility. I have in part kept to this undertaking. I have visited the Oxley and the Wilston Detention Centres in Brisbane. I had planned to visit the Westbrook Detention Centre but alas! it was burnt down before the visit could take place. The only other detention centre in Queensland is Cleveland at Townsville.

I have also visited Boys Town at Beaudesert, which is run by the De La Salle Brothers.

My impression of both Oxley and Wilston Detention Centres was, on the whole, favourable. However, comparatively speaking, Boys Town is a superior institution in a number of respects and especially in its schooling and trade-training facets.

I understand the Government is intending to replace Westbrook with a new institution. Could I respectfully suggest that, so far as is possible, in both design and concept it be modelled on Boys Town.

15. Legal and Other Representation

Quite apart from the role played by Childrens Court Judges under the new legislation, there are important roles to be played by legal and departmental representatives. Whether the Court can fulfil its role adequately will depend, in large measure, on the assistance that is forthcoming from the responsible offices and Departments – the Director of Prosecutions Office, the Legal Aid Offices, the Department of Family Services and Aboriginal and Islander Affairs, and the Police Service.

There should be no conflict of interest between these various bodies. They and the Court are all working towards the same goal – the resolution of juvenile crime. Generally speaking, to my disappointment, they have either failed fully to appreciate the fundamental importance of the Court or else they lack the resources to respond as I would wish in the public interest.

I am hoping that instead of sending to the Court relatively young, inexperienced and at times ill-informed officers, as has, with minor exceptions, been the case so far, the heads or senior officers of these offices will, in cases of state importance – and there are quite a few – come themselves and, by their visible presence in Court, demonstrate publicly the importance they attach to the management of juvenile crime.

16. Public Education and Information

From the opening ceremony to the present time I have been concerned, even anxious, to educate the community about juvenile crime by imparting as much information as possible through public addresses, and also by remarks in certain cases before the Court which from time to time are relayed to the public by courtesy of the media.

Earlier in this report, under 'Publication', I quoted remarks by three distinguished Australian judges about the great benefits to be derived from informing the public of our system of justice. 'The only guarantee of the continued survival of the Court system', observed the Chief Justice of South Australia, Justice King, 'is the support of informed public opinion'. And Mr Justice McGarvie commented that despite the unanimous opinion that the judicial system is dependent upon public confidence in it, 'practically nothing is done to provide the public with the information from which that confidence will grow.'

In the past year I have delivered the following public addresses:

1. Symposium Paper (Gold Coast, 4 March 1994);
2. Police Regional Crime Coordinator Conference (Police Headquarters, 15 March 1994, 'Juvenile Justice');
3. Department of Child Health (Royal Children's Hospital, 24 March 1994, 'Juvenile Justice');
4. International Association Arson Investigators, Queensland Chapter (Polo Club, 26 March 1994, 'Juvenile Justice');
5. Magistrates Conference on Domestic Violence (Gazebo Hotel, 28–29 March 1994, 'Juvenile Justice');
6. Neighbourhood Watch (Taringa Branch, April 1994, 'Juvenile Justice');
7. Dinner for newly inducted police constables (Oxley Academy, 28 July 1994, 'Seven Pillars of Freedom');
8. Child Protection Conference Dinner (Gateway Hotel, 9 September 1994, 'The Good and the Right Way').

I have also written an article on juvenile justice for the Law Society sponsored journal *The Broker* (May 1994 issue), which is distributed to all Queensland schools and TAFE Colleges.

As will be appreciated, these extra judicial functions are demanding of one's time and energy, but I have undertaken them cheerfully in furtherance of my strong belief that in this vexed area of juvenile crime the head of the Court's function does not begin and end with adjudicating cases and administering the Court; there is a parallel duty to inform the public on the issue of juvenile crime.

17. CHILDRENS COURT BUDGET

The following correspondence sets out the attempt to achieve a satisfactory Childrens Court budget.

Dear Judge,

Presently the Courts Division is working on Budget Submissions for funding for the 1994/95 financial year.

As you may be aware separate budget allocations are now made available to the District and Supreme Court Judiciary each financial year. These allocations relate to operating items or administrative costs such as Q-Fleet Vehicle Hire, telephones, airfares, travel costs, etc. In respect to the District Court, the Chief Judge has control and manages the budget in conjunction with a budget committee throughout the financial year.

In previous conversations I indicated that sufficient funds may not be available in the District Court Judges Budget to enable you to travel in your role as President of the Childrens Court to such places as Aurukun. It would therefore seem more appropriate that a separate allocation, independent from the allocation for travel currently set aside in the District Court Judges Budget, be afforded to you to enable you to manage your own travel budget in 1994/95.

The District Court Judicial Budget may be unduly affected by travel that you may have to undertake on Children Court matters if, for instance, you are required unexpectedly to travel on some urgent Children Court matter that has not been budgeted for within the District Court Budget.

It is for this reason that a separate allocation should be established and I would appreciate your advice on what would be appropriate amount to submit to the Executive of the Department in their budget deliberations. Attached is a printout of your travel expenditure for the financial year 1993/1994 which may be of assistance in formulating an appropriate travel allocation figure.

In considering your travel allocation I would ask that you also nominate an appropriate figure in respect to air travel so this may be formulated into a separate allocation.

Furthermore, in your role as President of the Childrens Court it may be necessary for you to attend special conferences which pertain to your current function. Again a separate allocation should be provided to enable you to attend these conferences. Would you kindly provide details (costs, subject matter and venue) of any such conferences you expect to be attending during the next financial year.

It would be the intention that these allocations be administered and controlled by you. Of course, my staff working in the Courts Division will be available to provide any assistance you may require in formulating and managing the proposed budget.

It would be appreciated if you could provide some figures on these matters by 4 May 1994 to ensure that the necessary submissions are made. I would be happy to discuss any of these matters further with you if you so wish.

Yours faithfully

David Hook
Director
Courts Division (Department of Justice and Attorney-General)

4 May 1994

Mr D. Hook
Director
Courts Division
Department of Justice and
Attorney-General
State Law Building
50 Ann Street
BRISBANE Q 4000

Dear Mr Hook,

I refer to your letter (undated) received by me late on Friday the 29 April. In your letter you ask me, as a matter of urgency, to prepare a Budget for the Childrens Court of Queensland for the 1994/95 financial year by Wednesday the 4 May. (Monday the 2 May was a public holiday.) I must say that the time allowed to prepare such a budget is altogether too short. There are many matters which require detailed consideration. Moreover, consultation with the Director-General of the Family Services Department which administers the Juvenile Justice Act is essential.

The first point I wish to make is that the Childrens Court is in its formative months. It is still going through an experimental period. I expect soon to have discussions with the Minister for Family Services and her Director-General with a view to recommending changes to the legislation with particular reference to the right of election afforded children under the *Juvenile Justice Act 1992* to be tried by a Judge other than a Childrens Court

Judge. The outcome of these discussions may significantly affect the Budget allocation.

The other points I wish to make are:

1. So far there are four Childrens Court Judges appointed under the *Childrens Court Act 1992* (including myself as President). I have recommended the appointment of two more: one at Cairns, and the other at Rockhampton. Is the budget intended to meet the additional expenses associated with the exercise of Childrens Court jurisdiction by all Childrens Court Judges so far appointed as well as those who might be appointed in the next financial year?

2. Under the present legal arrangements, Magistrates throughout Queensland are committing children who elect to be dealt with by a Childrens Court Judge to the Sittings of the District Court for the particular District. There are thirty District Courts in Queensland (including Brisbane). It is not possible to predict how many of such cases will be committed to District Courts outside Brisbane. The number of cases will vary from month to month. I am empowered to direct that a Childrens Court be held at any place at a specified time. Because of the foregoing, the person administering the Childrens Court must have a high degree of flexibility in the management of the Court.

3. As President of the Court, I have the responsibility of supervising the operation of the Court (including Childrens Court Magistrates) State-wide. The Magistracy does the bulk of Childrens Court work -- about 90 per cent. I should be able to visit Magistrates Courts at will to attend to any problems that may arise and to advise Magistrates on matters of policy, approach and principle. Again, a high degree of flexibility is required in this area.

4. From time to time I see it as my duty to make goodwill visits to remote communities such as Aurukun and Lockhart River where there is a good deal of juvenile crime to demonstrate to those communities the Court's interest in their affairs and concern for their problems and to suggest possible solutions.

5. To inform myself for the benefit of the Court as a whole, and indirectly the State, I should attend conferences both in Australia and overseas on Juvenile Justice. For example, there is an Australian Conference in Melbourne in July for heads of Juvenile Courts in Australia.

6. I have so far not sought separate secretarial assistance. I receive correspondence and requests from all over the State and elsewhere which must be answered. In addition, I have so far delivered some five public addresses on juvenile crime at the request of various responsible bodies, and expect that more requests will be made in the future. I see the dissemination of information about juvenile crime as being very much in the public interest. I submit that, for the time being, I should have access to separate part-time secretarial assistance. I doubt whether any other head of a Juvenile Court has been asked to perform his function without secretarial assistance.

7. There is need to subscribe to texts and publications on juvenile crime. The Supreme Court Library has a limited number of such texts and publications. To keep up with trends world-wide, I should have funds to acquire a separate library on juvenile justice related texts and publications.

All of the above impels me to say with all the emphasis at my command that I must be allowed flexibility of approach.

Properly understood, Juvenile Courts are probably the most important courts in the land. Long and bitter experience in the criminal courts has proved beyond a peradventure that a high percentage of persistent professional criminals started as juvenile delinquents who made repeated appearances in the Childrens Court. If their criminal tendencies could have been curbed or controlled through a judicious management of the Juvenile Court system, society would have benefited beyond measure and would have been spared untold anguish and expense.

If, therefore, the State is serious about controlling juvenile crime, as the current legislation seems strongly to suggest, then it is imperative that the Childrens Court of Queensland be properly funded.

In the circumstances adumbrated above, the best estimate I can make for the financial year 1994/95 is $50,000. If anything, I would say this figure is on the moderate, not to say modest, side. This sum may need significant modification in the light of developments by 1 September 1994, when the Court would have completed the first year of its operations.

Yours truly,
President, Childrens Court of Queensland

23 August 1994

His Honour
Judge McGuire
President
Childrens Court
Brisbane

Dear Judge

The Department has not established the various budget allocations to divisional areas.

Part of these allocations relate to Departmental Special allocations of which $10,000 has been apportioned for travel in your capacity as President of the Childrens Court.

The Department again faces stringent fiscal limitations this financial year and as a result, the $50,000 sought for travel and conferences associated with your work as President unfortunately could not be provided from the funds made available to the Department by Treasury.

It is hoped that this restricted funding will not unduly limit your ability to carry out your function.

Attached is a copy of a letter that will be sent to the Department of Family Services and Aboriginal and Torres Strait Islander Affairs, in an attempt to secure further funding, in view of the fact that the initiative for the creation of a Children's Court Judge and the responsibility for the legislation lies with that Department.

Please do not hesitate to contact me should you wish to discuss this matter further.

Yours sincerely,

David Hook
Director
Courts Division

23 August 1994

The Director-General
Department of Family Services
and Aboriginal and Torres Strait Islander Affairs

Dear Ms Machett

In the budget submissions the President of the Childrens Court, His Honour Judge McGuire, has sought a sum of $50,000 to allow him to travel throughout Queensland on Children Court matters and to attend appropriate conferences.

You may recall in May this year that the Director-General of this Department forwarded to you a request from Judge McGuire requesting that funding be made available to enable the President of the Childrens Court to travel more extensively in his role as President and to receive secretarial assistance. At that time you were unable to provide any funding.

In a letter to me dated 4 May 1994 the President outlined the need for funding for both travelling and conference expenditure and asked that there be enough funds available to allow him some flexibility in the management of the Court. I am attaching a copy of His Honour's letter for your information.

Unfortunately, due to the stringent fiscal limitations facing this Department, an allocation of $10,000 could only be provided for travel and conferences on Children's Court matters by the Judges of the Childrens Court from the funds made available by Treasury.

In view of the funding limitations to the President of the Childrens Court for the current financial year, I am again referring this matter to you in the hope that, at least with respect to travel expenses and attendance at conferences, you may see your way clear to provide some form of funding for the President of the Childrens Court.

I am forwarding a copy of this letter to the President of the Childrens Court for his information and would be grateful for your advice as to the question of funding so that I can advise His Honour accordingly.

Yours sincerely,

D Hook
Director
Courts Division

Negotiations are proceeding.

The correspondence points up the difficulties that can arise when the administration of particular pieces of legislation is shared by two Departments of State. Inter-department wrangling is to be avoided as it is sometimes inimical to the interest involved – in this case, the Childrens Court of Queensland. I should like to see the Childrens Court of Queensland brought under the administration of one Department. Without in any way detracting from the Department of Family Services which, on the whole, has rendered good and efficient service to the Court, I think it would be preferable if the financial administration of the Court came under the Department of Justice and Attorney-General; and I so recommend.

18. STATISTICAL TABLES

EXPLANATORY NOTE

The statistical data covers the period 1 September 1993 to 31 July 1994 – the first 11 months operation of the *Juvenile Justice Act 1992*.

The tabulation and graphical representation of the statistical data have been governed by the method by which data was able to be retrieved from each of the Courts.

The term 'dealings', as it relates to Magistrates Court Dealings (see figures 5, 6 and 7), encompasses matters disposed of at Magistrates Court level by a Childrens Court Magistrate whether by trial or sentence. It does not include matters which were not the subject of a sentence order, i.e. it does not include committals, dismissals or withdrawals. The same definition applies to the term 'dealings' as it relates to Childrens Court of Queensland dealings (see figures 8, 9 and 10). Additionally, Childrens Court of Queensland dealings do not include numerous matters before the Childrens Court of Queensland which were dealt with by a Childrens Court Judge in the capacity of a District Court Judge, either because the charges are non-serious indictable offences and there has been no reference pursuant to s. 127 of the Juvenile Justice Act or because the child charged with a serious offence has elected to be dealt with by the District Court; nor does it include matters terminated by way of *nolle prosequi*. It should be noted that very recent committals to a Childrens Court Judge, the District Court or the Supreme Court, whilst they are included in the 'Committals' statistics, will not be included in the statistics of matters dealt with (i.e. disposed of) by a Childrens Court Judge, the District Court or the Supreme Court.

Each major heading of offences includes 'attempts'. 'Police offences' comprise offences committed against police, e.g. assault police, resist arrest etc. 'Higher Courts', in figures 11, 12, 13 and 14, means the District and Supreme Courts. 'Serious offences', in figure 2, refers to 'serious offences', as defined by s. 8 of the *Juvenile Justice Act 1992*. 'Other offences' at Magistrates Court level comprise offences which do not fall into the identified listed categories and consist mainly of minor offences, such as disorderly conduct, obscene language, trespass, evade taxi fare. In the Childrens Court of Queensland and Higher Courts tables and graphs, the term 'other offences' comprise, *inter alia*, false pretences, escape from lawful custody.

It is clear from the data that the number of offences committed (see figure 4) and offences dealt with (see figures 6, 9 and 13) greatly exceeds the number of children committed (see figure 3) and dealt with (see figures 5, 8 and 11). This is explained by the fact that it is not uncommon for children to be charged with multiple offences. It is not possible to identify repeat offenders as individual offenders from the data received. However, this fact does not significantly alter the total number of offenders dealt with.

Many children charged with multiple non-serious offences are referred to the Childrens Court of Queensland by Childrens Court Magistrates when they are of opinion that the degree of criminality is deserving of a punishment beyond their sentencing power (see s. 127 of the *Juvenile Justice Act 1992*). In some instances children have been charged with scores of offences. This is a factor that should be firmly borne in mind when comparing the number of non-serious offences dealt with in the Childrens Court of Queensland (see figure 2). To further illustrate this point, for 917 offences dealt with in the Childrens Court of Queensland (see figure 9), there were 180 offending children (see figure 8) – a ratio of 5.09:1. For 893 offences dealt with in the District Court (see figure 13) there were 303 offending children (see figure 11) – a ratio of 2.95:1

Abbreviations

AOBH	Assault occasioning bodily harm
GBH	Grievous bodily harm
UUMV	Unlawful use of a motor vehicle

Figure 1 **Court dealings vs police cautions**

Offence	Cautions	Magistrates Courts	Childrens Court	District Courts	Supreme Court
Homicide	0	0	1	1	2
Assault	523	323	45	75	0
Sexual Assault	155	15	6	22	0
Drugs	1375	468	7	0	0
Robbery	21	2	46	30	0
Theft, breaking and entering	7946	2851	551	541	0
Property Damage	1290	508	66	103	0
Other Offences	1462	2895	195	122	15

Figure 2 **Distribution of serious and non-serious offences in Brisbane courts**

Court	Serious	Other
Childrens Court	47	509
District Courts	114	391
Supreme Court	7	10
TOTAL	**168**	**910**

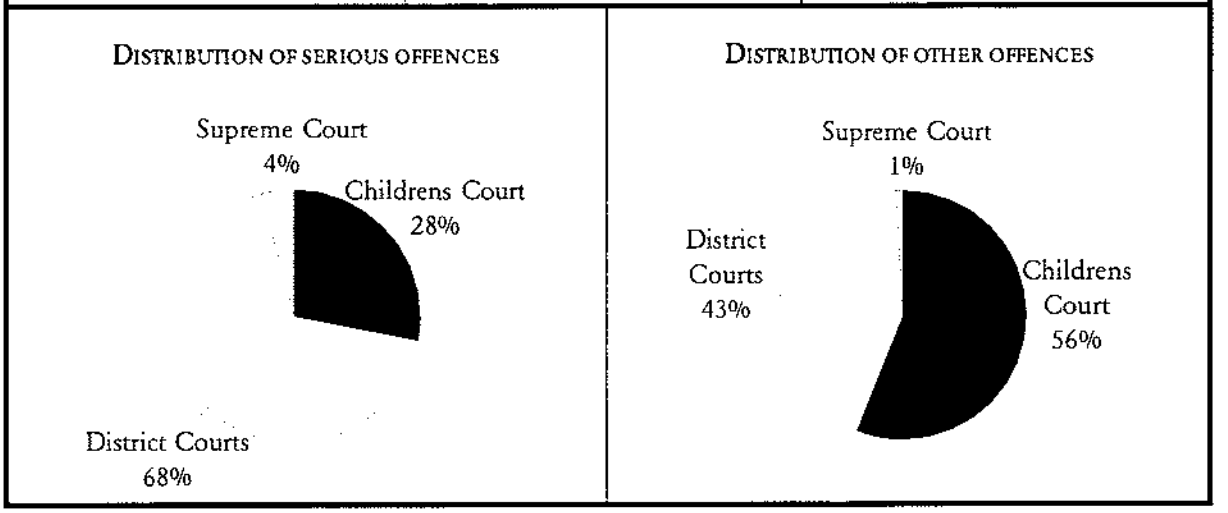

Figure 3 Magistrates Court committals – ages

Age	Brisbane		Non-Brisbane		Total	
	Male	Female	Male	Female	Male	Female
Unknown	1	0	0	0	1	0
10	0	0	0	0	0	0
11	0	0	11	0	11	0
12	2	0	7	2	9	2
13	7	4	58	6	65	10
14	28	7	101	15	129	22
15	52	8	132	13	184	21
16	98	1	166	3	264	4
17	47	5	23	10	70	15
18	5	0	1	0	6	0
TOTAL	**240**	**25**	**499**	**49**	739	74

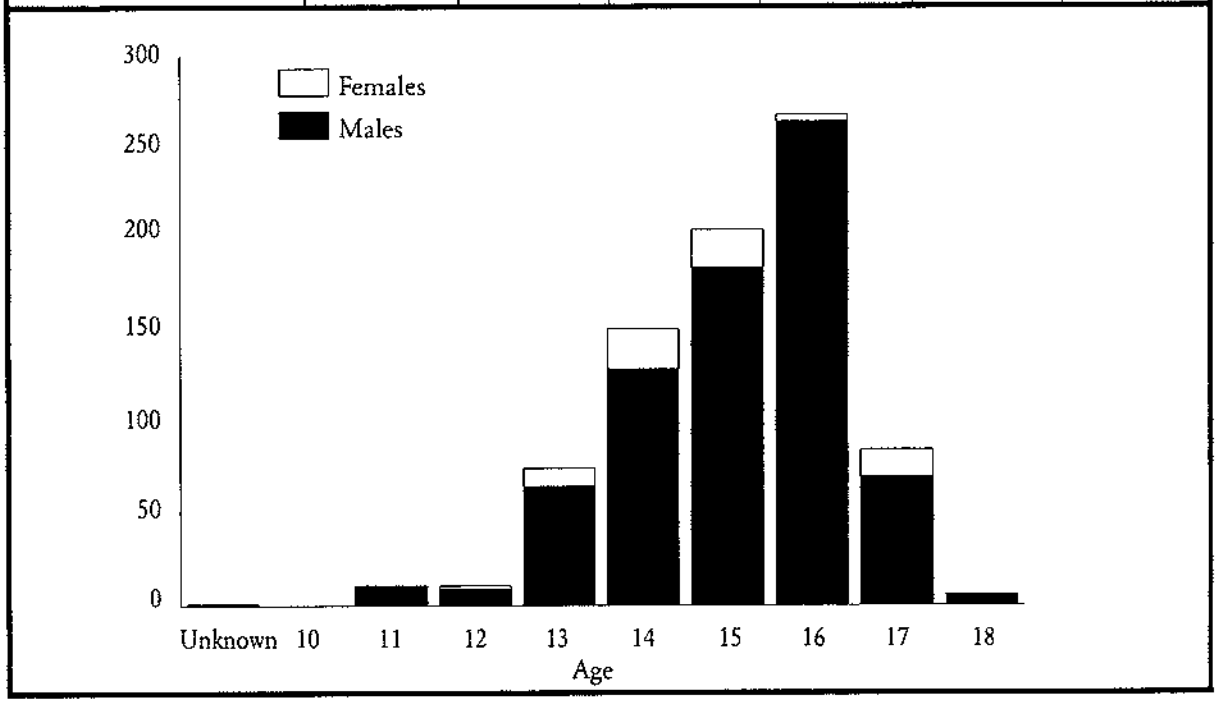

Figure 4 Magistrates Court committals – offences

Offence	Brisbane		Non-Brisbane		Total	
	Male	Female	Male	Female	Male	Female
Homicide	0	0	4	0	4	0
Assault	14	2	59	7	73	9
AOBH	23	6	29	7	52	13
'Serious' assault	5	5	13	2	18	7
GBH	1	0	3	0	4	0
Rape	2	0	7	0	9	0
Other sex offences	6	0	14	0	20	0
Robbery	32	14	47	1	79	15
Drug offences	8	0	1	0	9	0
UUMV	146	0	109	0	255	0
Other traffic offences	39	0	5	0	44	0
Burglary	3	0	5	1	8	1
Break and enter	149	0	351	13	500	13
Stealing	150	4	311	33	461	37
Damage	58	4	77	6	135	10
Arson	6	0	17	0	23	0
Receiving	11	0	15	0	26	0
Police offences	4	5	20	5	24	10
Other offences	43	0	46	4	89	4
TOTAL	**700**	**40**	**1133**	**79**	**1833**	**119**

cont'd

Figure 4 *Continued*

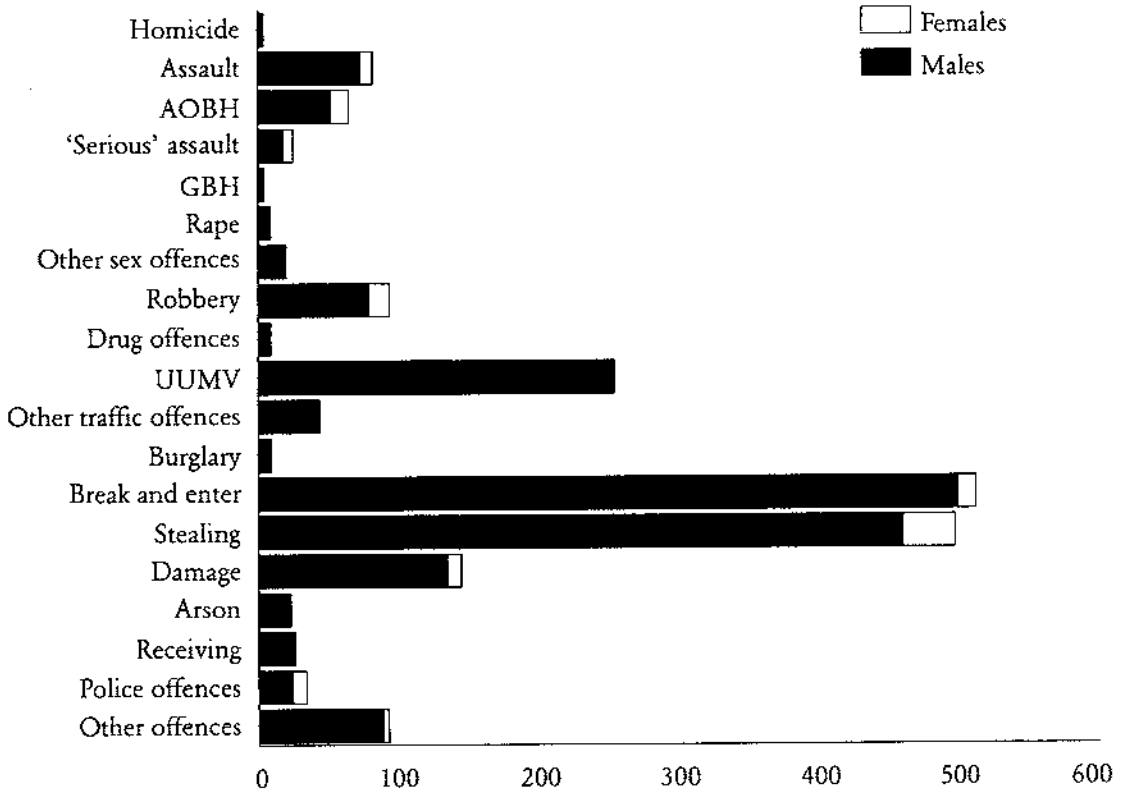

Figure 5 Magistrates Court dealings – ages

Age	Brisbane		Non-Brisbane		Total	
	Male	Female	Male	Female	Male	Female
Unknown	13	0	19	0	32	0
10	0	0	12	0	12	0
11	5	2	25	2	30	4
12	6	1	52	5	58	6
13	17	3	151	19	168	22
14	55	16	317	52	372	68
15	84	27	465	88	549	115
16	158	25	812	135	970	160
17	132	21	97	16	229	37
18	0	0	1	0	1	0
TOTAL	**470**	**95**	**1951**	**317**	**2421**	**412**

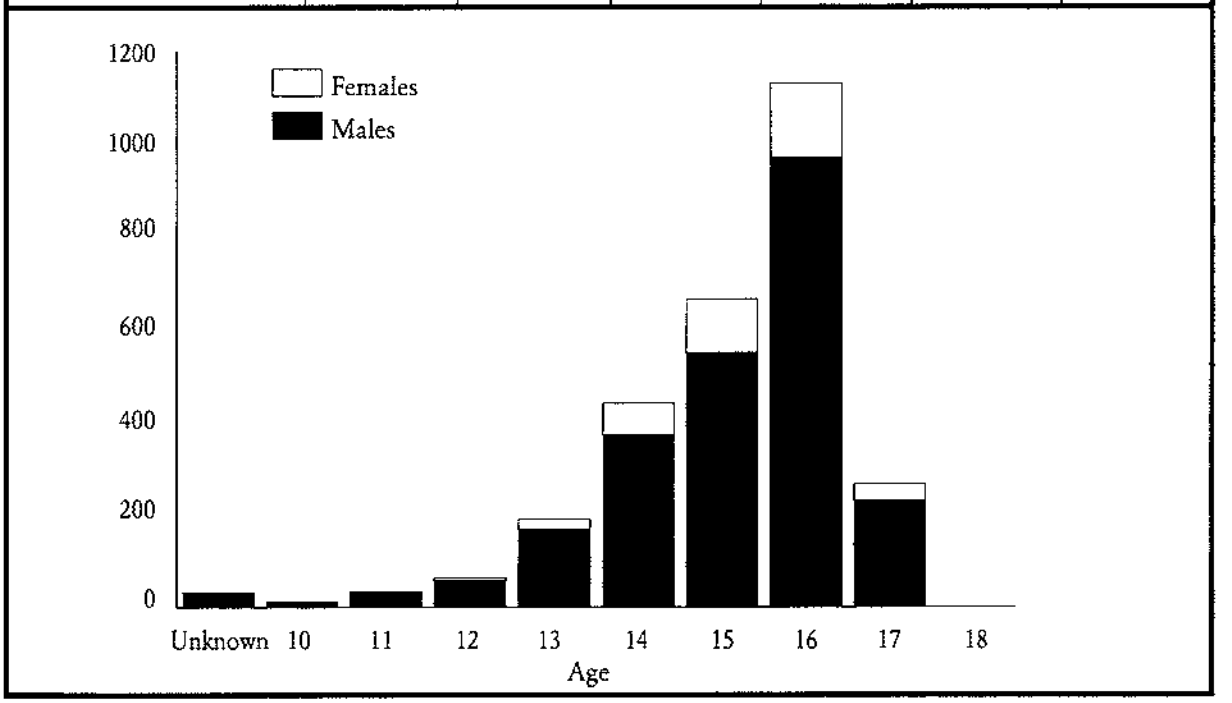

Figure 6 Magistrates Court dealings – offences

Offence	Brisbane		Non-Brisbane		Total	
	Male	Female	Male	Female	Male	Female
Homicide	0	0	0	0	0	0
Assault	11	4	93	14	104	18
AOBH	17	4	81	12	98	16
'Serious' assault	8	3	59	17	67	20
Rape	0	0	0	0	0	0
Other sex offences	1	0	14	0	15	0
Drug offences	109	15	295	49	404	64
UUMV	106	22	394	23	500	45
Other traffic offences	50	6	690	56	740	62
Burglary	5	0	6	0	11	0
Break and enter	129	7	1066	57	1195	64
Stealing	181	58	1200	144	1381	202
Damage	107	35	417	30	524	65
Arson	0	0	0	0	0	0
Receiving	17	6	103	20	120	26
Police offences	140	25	266	63	406	88
Other offences	268	54	477	108	745	162
TOTAL	1149	239	5161	593	6310	832

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Figure 6 *Continued*

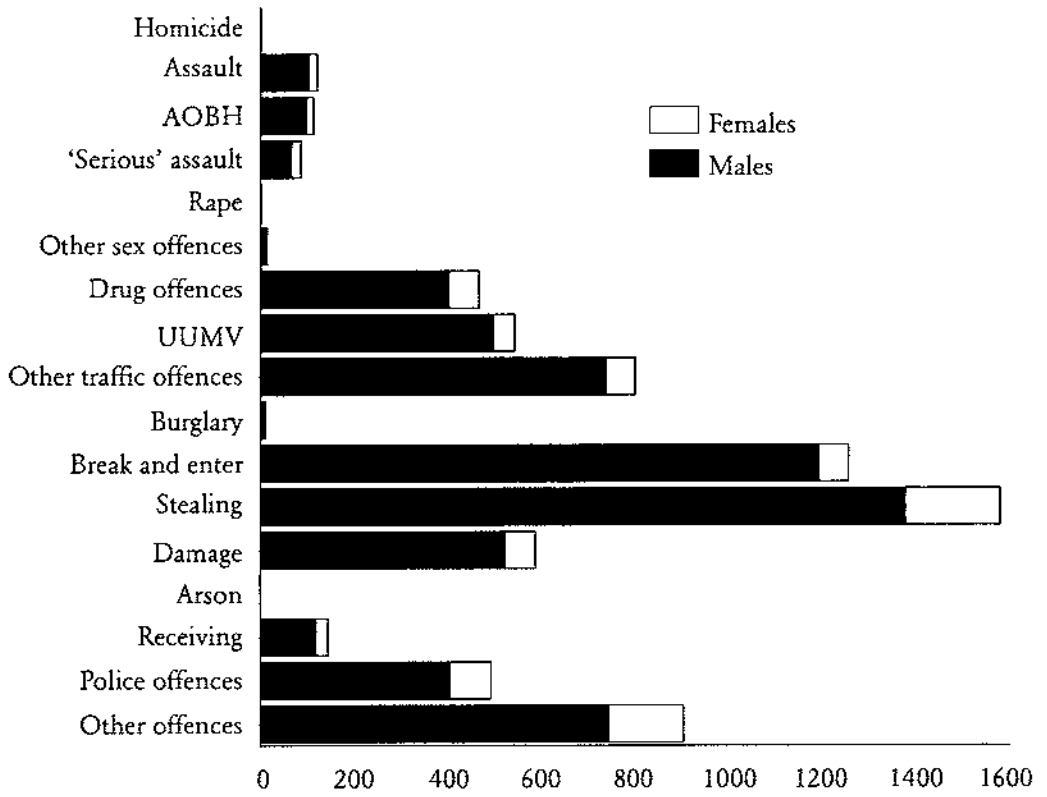

Figure 7 **Magistrates Court dealings – orders**

Order	Brisbane		Non-Brisbane		Total	
	Male	Female	Male	Female	Male	Female
Reprimand	132	40	785	140	917	180
Community service	130	12	285	23	415	35
Good behaviour	131	44	421	61	552	105
Probation	198	39	514	67	712	106
Fine imposed	34	2	211	12	245	14
Restitution	62	5	423	29	485	34
Detention	86	2	68	3	154	5
Licence disqualified	32	3	41	2	73	5
Other order	3	2	77	10	80	12
TOTAL	**808**	**149**	**2825**	**347**	**3633**	**496**

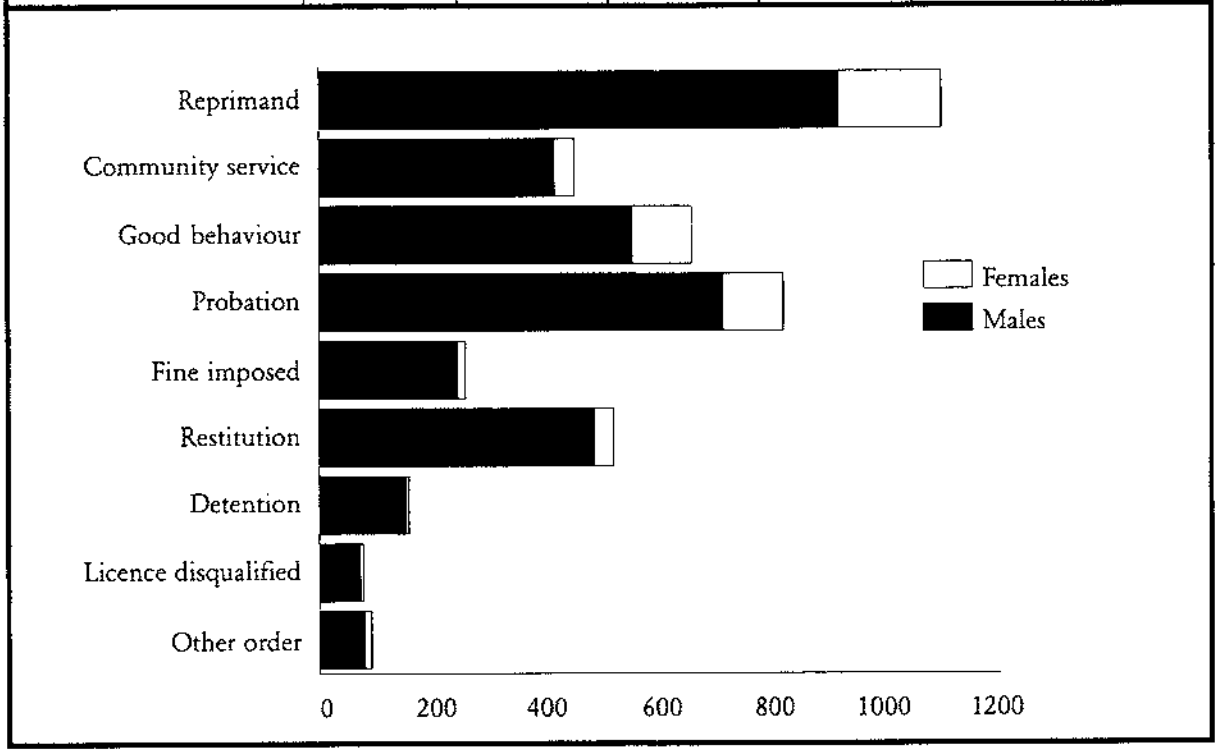

Figure 8 Childrens Court of Queensland dealings – ages

Age	Brisbane		Southport		Townsville		Total	
	Male	Female	Male	Female	Male	Female	Male	Female
9	0	0	1	0	0	0	1	0
10	0	0	0	0	0	0	0	0
11	0	0	1	0	0	0	1	0
12	2	0	3	0	0	0	5	0
13	8	0	0	1	3	0	11	1
14	15	1	2	0	7	0	24	1
15	37	1	3	3	15	0	55	4
16	36	1	2	1	13	1	51	3
17	10	2	0	0	10	1	20	3
18	0	0	0	0	0	0	0	0
TOTAL	108	5	12	5	48	2	168	12

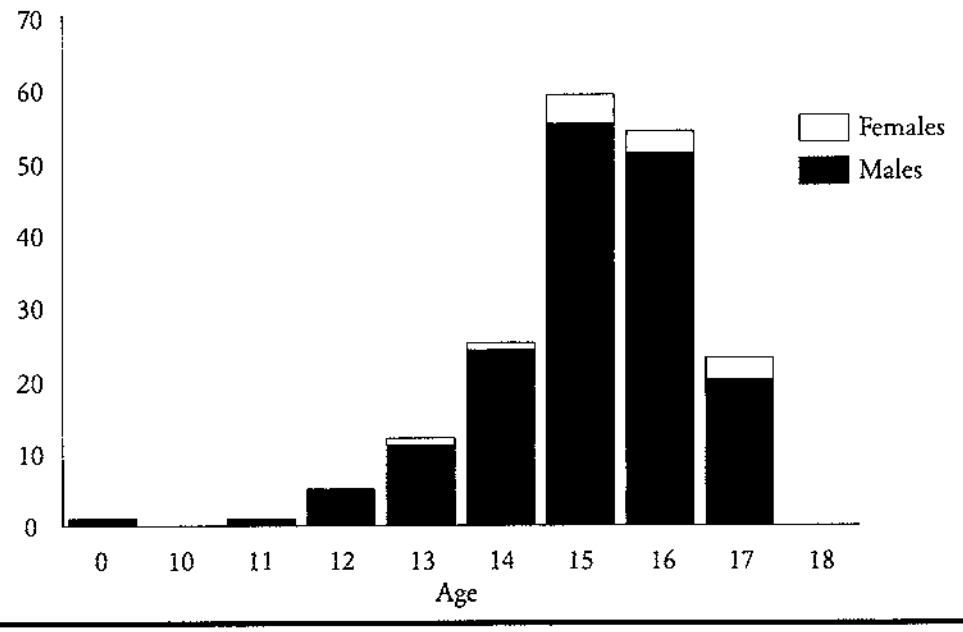

Figure 9 **Childrens Court of Queensland dealings – offences**

Offence	Brisbane		Southport		Townsville		Total	
	Male	Female	Male	Female	Male	Female	Male	Female
Homicide	1	0	0	0	0	0	1	0
Assault	4	0	0	0	6	0	10	0
AOBH	12	0	0	4	5	0	17	4
'Serious' assault	14	0	0	0	0	0	14	0
GBH	0	0	0	0	0	0	0	0
Rape	1	0	0	0	0	0	1	0
Other sex offences	5	0	0	0	0	0	5	0
Robbery	30	2	5	0	9	0	44	2
Drug offences	6	0	0	0	1	0	7	0
UUMV	88	2	4	0	14	2	106	4
Other traffic offences	5	5	0	0	2	1	7	6
Burglary	6	0	0	0	3	1	9	1
Break and enter	166	1	15	1	132	0	313	2
Stealing	124	4	19	4	68	7	211	15
Damage	40	1	18	0	7	0	65	1
Arson	7	0	4	0	1	0	12	0
Receiving	4	1	0	1	4	3	8	5
Police offences	0	0	0	0	0	0	0	0
Other offences	26	1	3	0	17	0	46	1
TOTAL	**539**	**17**	**68**	**10**	**269**	**14**	**876**	**41**

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Figure 9 *Continued*

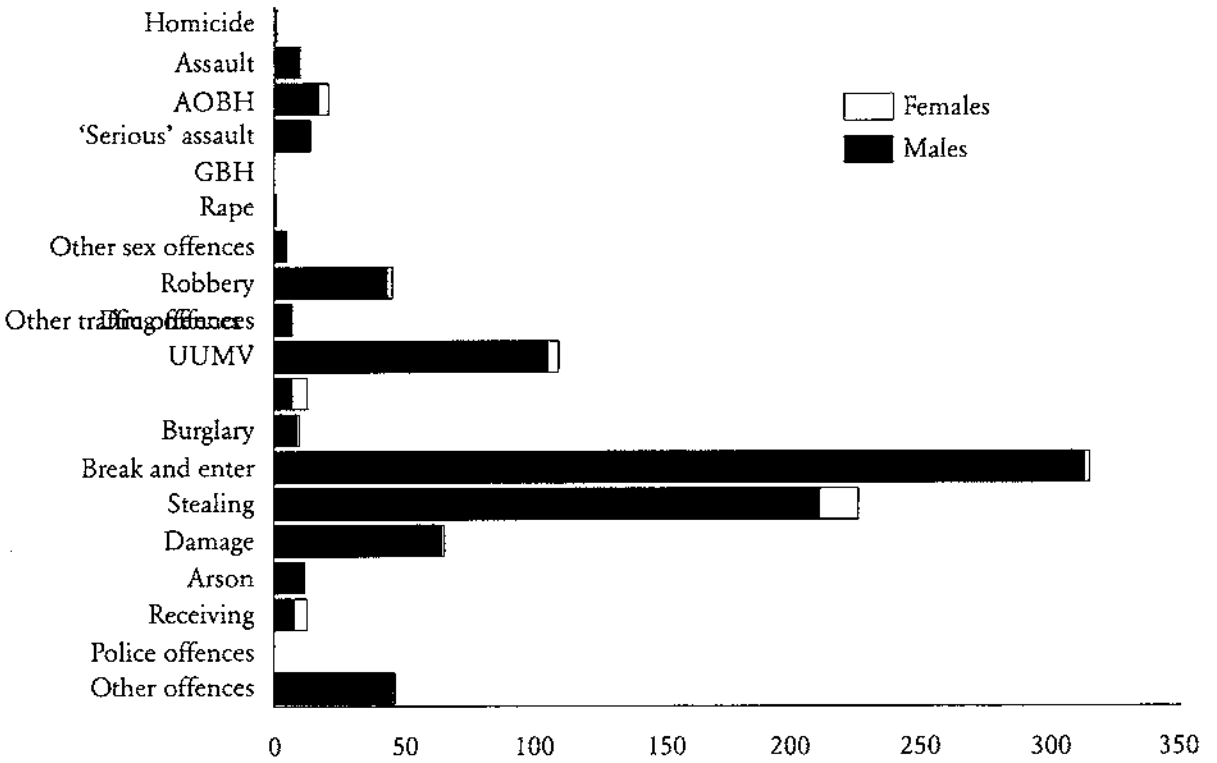

Figure 10 **Childrens Court of Queensland dealings – orders**

Order	Brisbane		Southport		Townsville		Total	
	Male	Female	Male	Female	Male	Female	Male	Female
Detention	21	0	1	0	9	0	31	0
Probation	57	4	9	4	33	2	99	10
Community service	31	2	3	1	11	1	45	4
Restitution	18	1	4	1	2	0	24	2
Fine imposed	0	0	0	0	0	0	0	0
Good behaviour	2	1	0	1	6	0	8	2
Reprimand	0	0	0	0	1	1	1	1
Licence disqualified	1	0	0	0	0	0	1	0
Mag. order confirmed	5	1	0	0	0	0	5	1
Mag. order varied	4	0	0	0	0	0	4	0
Grant bail application	2	0	0	0	0	0	2	0
Refuse bail application	3	0	0	0	0	0	3	0
Adjourned	0	0	0	0	4	1	4	1
TOTAL	144	9	17	7	66	5	227	21

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Figure 10 *Continued*

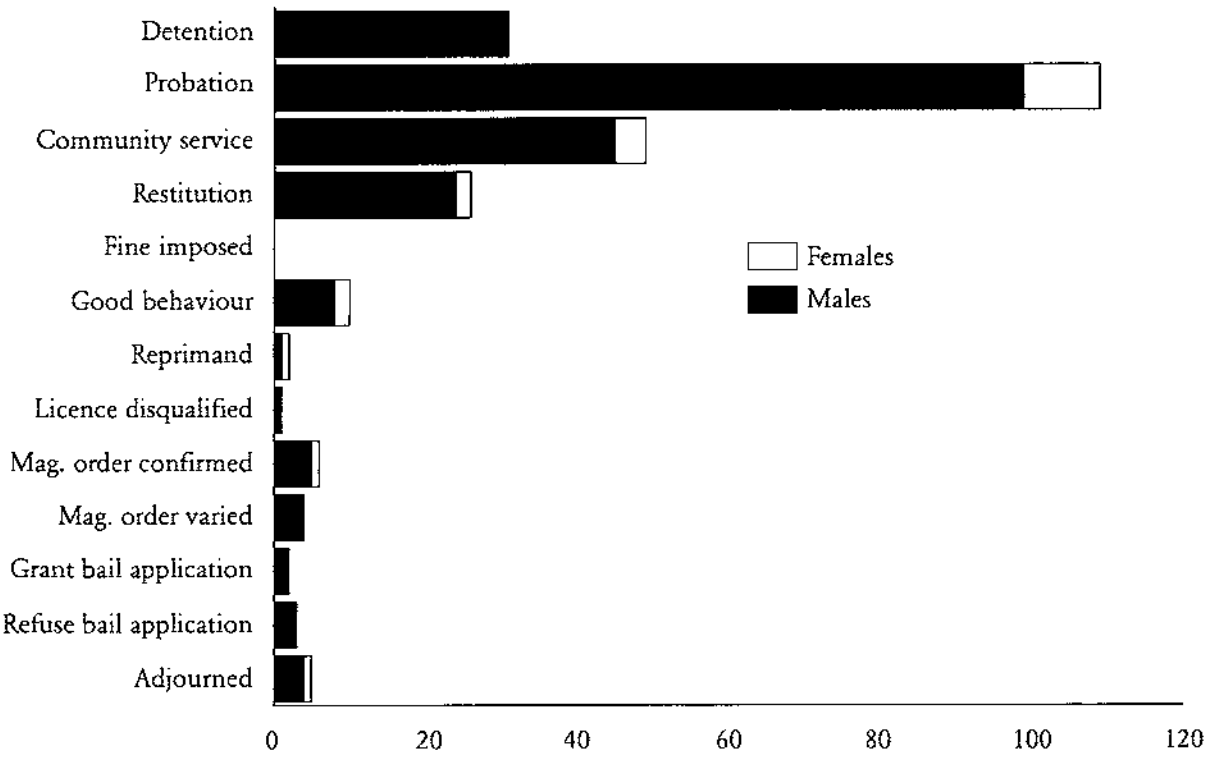


Figure 11 **Higher court dealings – ages**

Age at date of committal	Supreme Court	District Court
9	0	1
10	0	2
11	0	4
12	0	10
13	0	31
14	0	52
15	2	74
16	2	83
17	0	25
Unknown	0	21
TOTAL	4	303

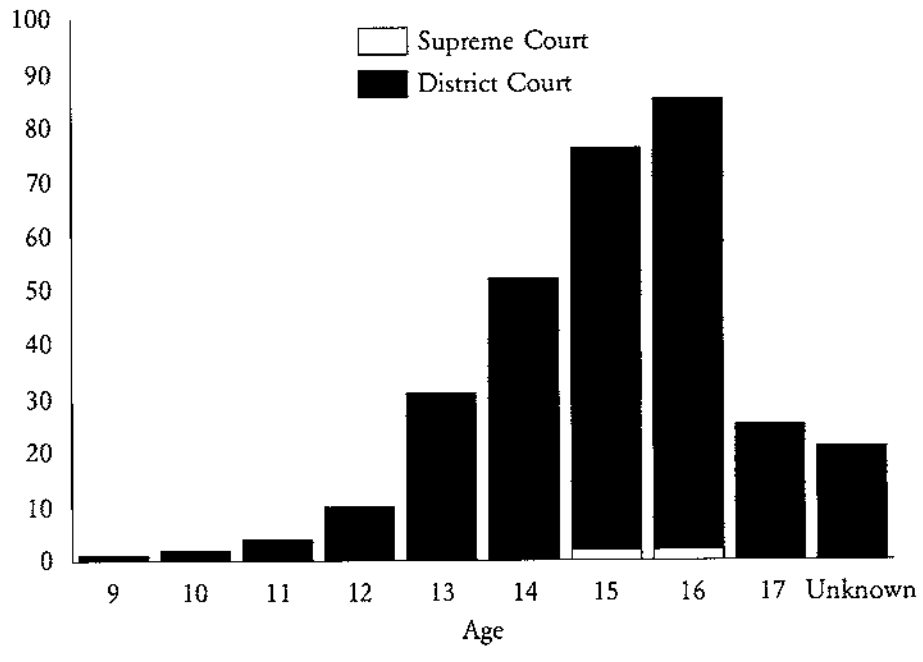


Figure 12 **Sex of defendant in higher courts**

Sex	Supreme Court	District Court
Male	4	270
Female	0	17
Unknown	0	16
TOTAL	4	303

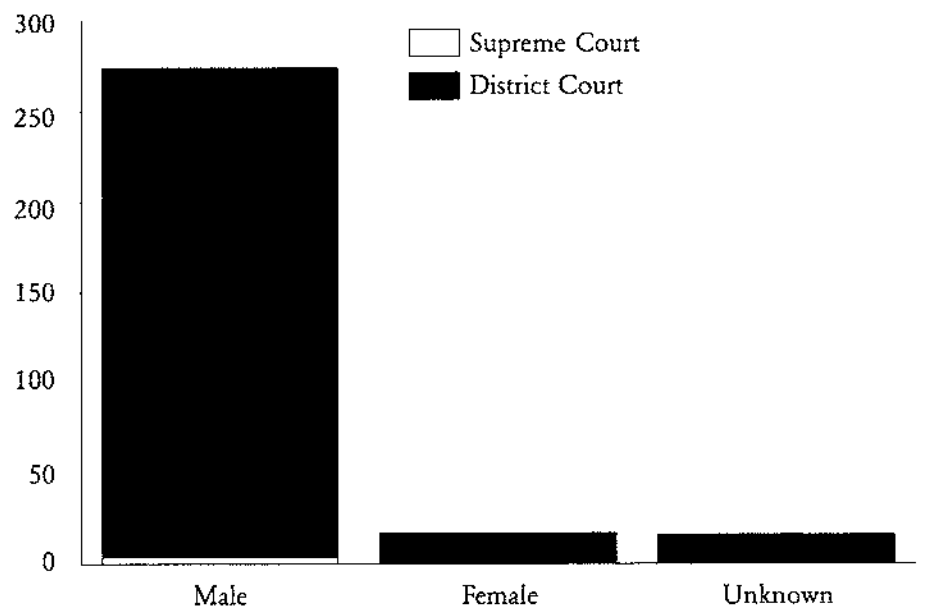


Figure 13 Higher court dealings – offences

Offence	Supreme Court	District Court	Total
Attempted murder	1	0	1
Manslaughter	1	0	1
Drugs	0	0	0
Assault	0	75	75
Sexual assault	0	22	22
Robbery and extortion	0	30	30
Fraud and misappropriation	0	11	0
Theft, breaking and entering etc.	0	541	541
Property damage	0	103	103
Other	15	111	126
TOTAL	**17**	**893**	**910**

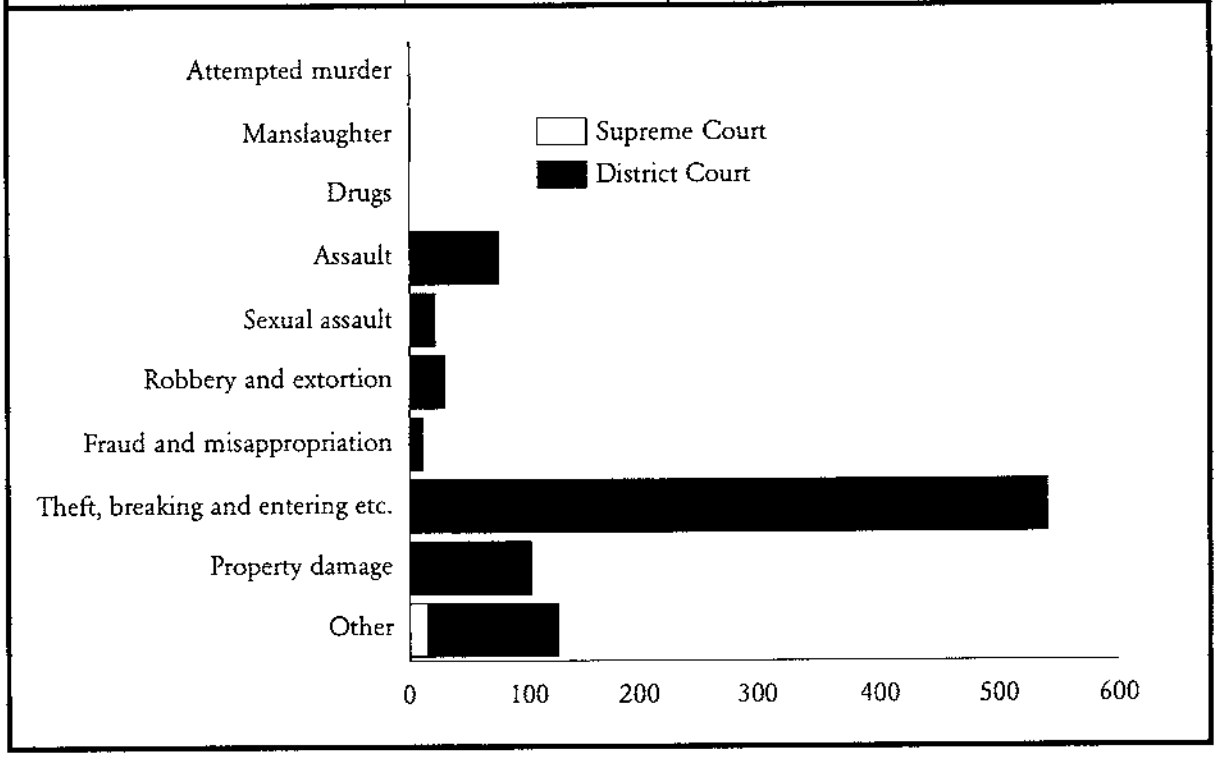
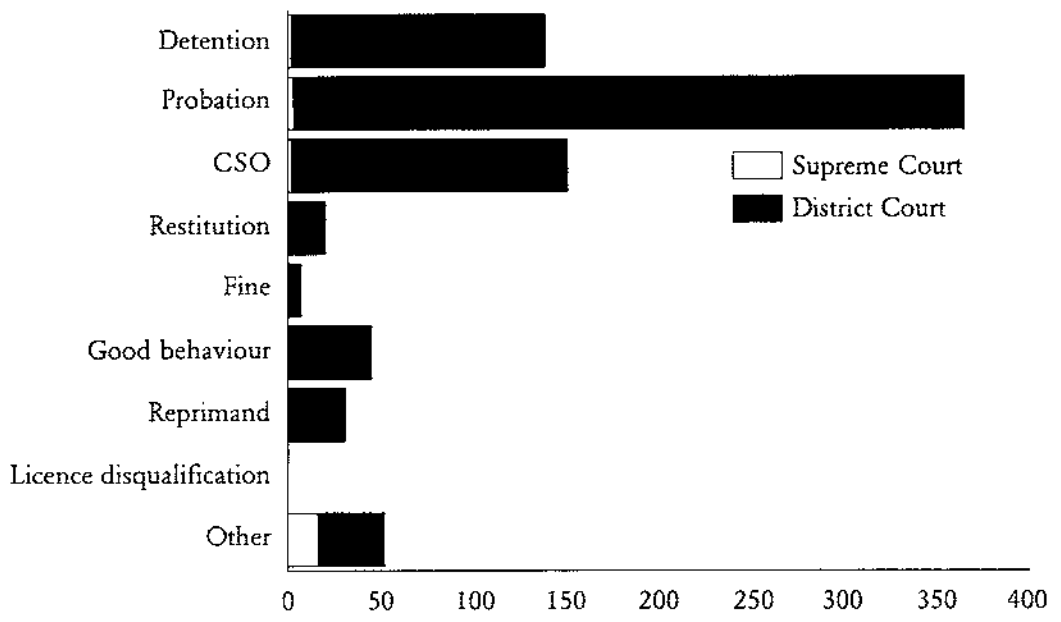


Figure 14 **Higher court dealings – orders**

Orders Made	Supreme Court	District Court
Detention	2	137
Probation	3	362
CSO	2	149
Restitution	0	20
Fine	0	7
Good behaviour	0	45
Reprimand	0	31
Licence disqualification	0	0
Other	16	36
TOTAL	23	787



19. NEGLECT OF THE YOUNG

Closely related, in the public perception, to family breakdown and child neglect is a decline in home and school discipline. The questions of child neglect and the decline in home and school discipline loom large in any discussion on the possible causes of juvenile delinquency. I deal with each in turn.

Neglect of the young can be worse than abuse.

When children turn to crime, what is the cause? And, in particular, what is the role of child neglect? Millions of words have been voiced on this subject and there is no consensus. But while child abuse, both physical and sexual, has become so important a subject among those who deal with child welfare, the neglect of children per se may be forgotten. Yet neglect is probably more widespread and more damaging in life terms than the more obvious effects of the overt abuse of children. Childrens Courts see the results of neglect almost daily in the behaviour of young delinquents. Childrens Courts see these when it is almost too late for change and the young have many offences behind them.

There is a vital need for the practical support of inadequate, neglectful and irresponsible parents. Research in the United States suggests that the prognosis for neglected children is worse than for those who suffer some sexual or physical abuse. With no controls and no boundaries, they have little hope and few prospects. They, in their turn, will make neglectful parents. One should not shut one's eyes to the reality that such a vicious circle exists.

Dr Donna Rosenberg, an American researcher, believes that some families have managed to change. But primary care is more important than responding to disastrous family situations. Dr Rosenberg puts psychotherapy and psychology low down on her list of treatment for inadequate families. More important is the kind of non-judgmental support that can be given by trained volunteers who go into homes and help parents organise their own and their children's lives. It is the kind of support which was once offered by the extended family, but because of changing social attitudes towards marriage and procreation, extended-family support is no longer readily available.

According to Dr Rosenberg, advice about poor parenting is not enough. The problem, she says, is not one of information. It is an emotional and intellectual problem that is very difficult to resolve.

In England, the Home Office is investing in active-learning pre-school programs, and in a recent report the Family Policies Study Centre advocates the teaching of parent-craft as a way of helping to prevent juvenile crime.

A patient and persistent application of this strategy may help break the vicious circle of neglectful parents producing neglected children who turn to crime as a by-product of that neglect.

20. Home and School Discipline

The common law always recognised the right of a parent or a teacher to inflict reasonable punishment on a child. In 1860 the Lord Chief Justice of England, Lord Cockburn, expounded the law thus:

> By the law of England, a parent or schoolmaster (who for this purpose represents the parent, and has parental authority delegated to him) may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment – always, however, with this condition: that it is moderate and reasonable.

Section 280 of the Queensland Criminal Code embodies the common law. It provides that:

> It is lawful for a parent or a person in the place of a parent or for a schoolmaster or master to use, by way of correction, towards a child, pupil or apprentice under his care such force as is reasonable under the circumstances.

Today's educational authorities seem to be limiting the use of corporal punishment in schools. Those not banning it completely are imposing severe restrictions on its use. In general, only principals or those directly authorised by them may now administer corporal punishment. I understand the current position in Queensland is that a school principal or a duly authorised deputy principal may administer corporal punishment to boys (only) for, *inter alia*, insolence, wilful and persistent disobedience and gross misconduct that in the principal's opinion is likely to prejudice the good order and discipline of the school. It is proposed that by the end of 1994 corporal punishment will be phased out altogether in Queensland schools. The power of suspension or expulsion of a pupil in an extreme case remains unimpaired.

It is my belief that in the homes and schools of today the authoritarian figure of the parent and the schoolmaster has all but disappeared. In the school context, the possible consequences of this shift of attitude is that teachers may become more vulnerable to false, malicious or vexatious complaints of assault, with or without sexual connotations, by disaffected or mischievous pupils.

I myself do not want to get embroiled in the debate over whether, in general, corporal punishment is a good or a bad thing. I would simply say the greatest advantage of punishment – if there is to be any – is gained if it follows quickly on the offence. It is obvious that the desired impression is best brought about by

a summary and immediate punishment. As the great Francis Bacon, sometime Lord Chancellor of England, said long ago: Fresh justice is the sweetest.

The uncompromisingly robust language of Ackner J in a 1972 English case is, I fear, a far cry from the present-day attitude about corporal punishment.

The facts of the case were as follows. A 15-year-old pupil smoked during the morning break, made rude gestures at the teacher, swore at him, kicked him in the stomach, and then ran away. The master gave him a blow, which broke his jaw. The master was charged with grievous bodily harm, later reduced to assault occasioning bodily harm.

In this corker of a summing-up to the jury, Ackner J said:

> Have we really reached the stage in this country when an insolent and bolshie pupil has to be treated with all the courtesies of visiting royalty? You may think we live in strange times. Whatever may be the view of our advanced, way-out theoreticians, the law does not require a teacher to have the patience of a saint. You may think that is a good thing. You may think that a superabundance of tolerance fails to produce a degree of self discipline in any pupil. Nothing has happened to the boy concerned, although he could be brought before a Juvenile Court and receive a wide range of penalties. Yet a schoolmaster, a man of exemplary character and an able, efficient and conscientious teacher, has been brought before the Court. This is why I say we live in strange times. The issue is not whether nowadays we suffer from an excess of sentimentality or sloppy thinking with regard to criminal responsibility of the young. It is whether the prosecution has proved the master guilty.

Needless to say, the schoolmaster was acquitted.

21. THE ENGLISH EXPERIENCE

In the wake of the Bulger case – the case of two boys, Thompson and Venables, aged 11, abducting and killing James Bulger, a child aged 2, in the cruelest imaginable circumstances – the people of England were so repelled that they looked inwardly at themselves: there was a good deal of self-questioning about the causes and treatment of juvenile crime. For the politicians, the pundits and the public at large, it was a time to search the soul of the nation. The people of England had been uneasily aware for a long time of a growing juvenile crime problem that was encroaching increasingly on their lives. The sudden, shocking crime galvanised public opinion.

The Home Secretary, Mr Kenneth Clarke, spoke on BBC Radio Four of the loss of values and sense of purpose among the young, and the feeling that they could get away with anything. He said:

> I do believe the Courts should have the power to send really persistent, nasty little juveniles away where they will be looked after better and educated.

Turning to social workers, he added:

> They have to accept that they are not succeeding at the moment with children. It is no good mouthing political rhetoric about why children in their care are so delinquent...I believe it is not good that some sections of society are permanently finding excuses for the behaviour of the section of the population who are essentially nasty little pieces of work. You have to be able to arrest them, convict them before properly conducted courts and then have a regime of punishment in prison which is so organised that it might make them capable of reform.

The Home Secretary foreshadowed the creation of detention centres for young offenders (12 to 14) to provide high standards of care, including education and trade training, as well as discipline, to build their characters. Detainees should stay for an average of 6 months to a year, with close follow-up supervision.

Labour's then Shadow Home Secretary, Tony Blair (now leader of the Opposition) said in a *Daily Mirror* article on 22 February 1993:

> There is something very wrong and sick at the heart of our society...Criminals of 10 or 11 did not just happen. Broken homes, bad housing, poor education, no job training and lack of hope or opportunity all affected the way a child developed. Those young kids who had become

> a real danger to society, who are out of control, will have to be put in some sort of secure accommodation. That is the tragedy – but there is no other realistic option if the public is to be properly protected.

For determined repeat offenders and compulsive delinquents – often tagged 'difficult' or 'problem' children – new measures are proposed. There is presently before the English Parliament the Criminal Justice and Public Order Bill. It is designed to give power to the Courts to send persistent juvenile offenders aged 12 to 14 into custody. The Courts are entitled to issue 'secure training orders', which will confine persistent offenders in purpose-built detention centres, institutions designed to provide education and training as well as secure custodial care for periods of 3 to 12 months, to be followed by a period of supervision in the community of equal length. Breach of such supervision would land the offender back in the detention centre for up to 3 months. Candidates for secure training orders will be 12- to 14-year-olds who have 3 previous convictions for an offence which, if committed by an adult, would qualify for a prison sentence; they must also on this, or a previous occasion, have been in breach of a supervision order or have been found guilty of an imprisonable offence while under supervision.

Hitherto the management of juvenile offending in the 12- to 14-year age bracket was entrusted to local authorities who were responsible for supervising 12- to 14-year-olds in secure Council accommodation. However, such accommodation proved ineffective with a hard core of youthful repeat offenders.

The capital and recurrent cost of the proposed new detention centres is very high. It is proposed to build 7 new institutions at a total cost of £75 million. £30,000 per year is the estimated cost of keeping, training and educating one offender. £30 million per year is to be allocated for the annual running costs. In its editorial of 16 May 1994 *The Times*, under the heading 'Detaining the young: Courts must have the right to contain persistent offenders', commented:

> The Courts need a more effective approach for protecting the public and making an impression on anti-social people... Cases of local communities being terrorised by children below the age of legal responsibility (15 years) have brought pressure for change in an area where the courts and the police seem to be powerless...Even those who dislike the idea of incarcerating the very young accept that the larger community of law-abiding people has a right to be protected from those of any age who are wantonly destructive.

Magistrate Paula Davies, Chairwoman of an inner London Youth Court, cast doubt on the wisdom and efficacy of the new law in an article in *The Times* of 3 May 1994. She said:

> Custody in terms of re-offending does not work. Eighty per cent of those sentenced to youth custody re-offend within two years....Over the years all the research has shown that the more punitive a regime the worse the outcome. Experience in America should warn of the danger of custody. In the last two decades the number of people in U.S. prisons has quadrupled and some States spend more on prisons than on education.
>
> Yet the serious crime rate continues to rise. There is one shining example, however, in the State of Massachusetts. Over the last 10 years there has been a reduction in offending due to the use of orders in the community. Those involved in the experiment cannot understand why the British are thinking of taking up custody again when it was from us that they learnt how successful community-based service orders can be.

With respect to Ms Davies, she offers no solution for the persistent juvenile offender, the offender who under the new scheme has thrice been convicted of serious offences and in addition has breached a community-based order. Realistically, what are you to do? Persist with the old measures which have been unproductive of a change in the offender's attitude, or adopt sterner measures? Let the public be the judge.

The historian Paul Johnson in his recent book *Wake Up Britain!* devotes a chapter entitled 'A Society Fit for Criminals to Live In' to the impact of crime on Britain. Apropos of juvenile crime he says:

> Not only are more than half of all offences in Britain committed by those under twenty-one; but youths, and sometimes children, are responsible for a growing number of crimes so odious as to be almost beyond human comprehension...
>
> More and more serious crimes against children are being committed by youths or even by children themselves. The murder of four-year-old James Bulger by two eleven-year-olds attracted headlines in 1993, but this fortunately is regarded by police as untypical, as yet; far more common are serious sexual and other assaults. More horrific still are cases of juveniles who steal cars and carry out ram-raids, setting fire to shops and other buildings and driving at reckless speeds through residential districts. Such crimes produced a score of deaths of innocent passers-by in 1993. Recent

> statutes make it extremely difficult to convict juveniles of offences or to impose sentences which the public regard as appropriate. Youngsters who kill pedestrians while driving stolen cars often walk out of court free or are sent for institutional 'treatment' which the public does not regard as punitive. Police frankly confess that many child offenders, and even youths, are never brought to court at all as they cannot be bothered to go through all the paperwork involved, knowing that the punishment, even if a conviction is secured, will be derisory. Great anger was caused in 1993 when a fifteen-year-old who had been convicted of a long list of crimes, some of them serious, was sent on an eight-week safari in Africa costing £7000 as part of his 'cure', was released on his return and promptly stole another car. Local council tax-payers had to finance this expensive comedy. Millions of honest working-class families, whose tax burden is now considerable, burn with rage when they read in their newspapers of young criminals who, instead of being punished, are sent on sailing and adventure courses which are beyond the means of the average household. The public is still more incensed to discover that, under legislation passed against their wishes, some of the most prolific and destructive criminals cannot be punished at all. A case came to light in February 1994 of a criminal boy who, between the ages of twelve and fourteen, broke into 879 shops and businesses in the Carshalton area, burgled 113 homes and robbed four banks; he also stole eighty-seven cars. The value of the goods he stole was over £2 million. It took the police six days just to list the crimes he admitted. The boy had been arrested forty times. But though old enough to be a successful, large-scale habitual criminal, the law said he was not old enough to be held in custody, still less in prison. The most the courts could sentence him to was a twelve-month supervision order. The law even forbade newspapers from publishing his name, though he is known to the angry community he has pillaged as Kid Crook.
>
> There is a widespread feeling that, over the whole spectrum of crime and its punishment, Parliament and government ministers possess an entirely different set of standards and convictions from the people who elect them. The chasm between rulers and ruled is probably wider over crime than over any other issue.

Paul Johnson's criticisms of the system are couched in hyperbolic language, but they do bring home in a strong, albeit emotive, way the damage serious juvenile crime is doing to the fabric of British society, as well as to the children themselves and their families.

It is my sincerely held belief that the present Queensland juvenile criminal law, enshrined in the *Childrens Court Act 1992* and the *Juvenile Justice Act 1992*, does, in a very thoughtful and comprehensive way, strike a fair and proper balance between the extreme points of view – the welfare view based on benevolence and reform, and the due process view based on realism and the need to protect society from persistent, incorrigible and intractable offenders.

In *Re: Gault et.al* (1966) 387 U.S.1 the Supreme Court said that the Juvenile Court history has demonstrated that unbridled discretion as to the conduct of juvenile courts, however benevolently motivated, is frequently a poor substitute for principle and procedure. The Court observed:

> The absence of substantive standards has not necessarily meant that children received careful, compassionate, individualised treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles and due process have frequently resulted not in enlightened procedure, but in arbitrariness...

It is urged that the juvenile benefits from informal proceedings in the court. The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help to save him from a downward path. Then, as now, goodwill and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness – in short, the essentials of due process – may be a more expressive and more therapeutic attitude so far as the juvenile is concerned.

22. AURUKUN

On 3 June 1994 I visited Aurukun as head of the Childrens Court of Queensland. Soon after my appointment to this office in June 1993 I determined that the newly created Court should visit remote Aboriginal communities and ascertain for itself the problems of those communities. I selected Aurukun as a good sample community to visit first. The Directors-General of the Departments of Justice and Attorney-General and Family Services and Aboriginal and Islander Affairs gave me every encouragement to go to Aurukun. For making easy the way, I am grateful to them.

Aurukun is a remote Aboriginal community in the Peninsula country. It comprises about 800 Aborigines. The purpose of the visit was two-fold: to conduct a Childrens Court and to speak to the Mayor, the Shire Clerk and members of the Aurukun Council, as well as the elders of the community, about local law-and-order issues. The town officials and elders extended the utmost courtesy to me and my party. An official welcome was accorded us.

At the end of the day I met with the elders and representative groups of the community. We exchanged greetings and talked about the child crime problem in Aurukun. It was generally felt that families of offending children and elders should play a formally recognised role in the Court process and the ultimate disposition of cases. The *Courier-Mail* report of 4 June 1994, which is reproduced hereunder, gives a fair, accurate and balanced account of what transpired in and out of Court on the occasion of the Court's visit to Aurukun.

> **Judge's lesson in black justice**
> By Ben Robertson
> in Aurukun
>
> Some Aurukun juveniles believed being sent to a correctional centre was their 'initiation into adulthood', a judge was told yesterday.
>
> Judge Frederick McGuire visited Aurukun yesterday on a history-making 'voyage of discovery'.
>
> It was the first time a judge presiding over a higher court had visited the tiny Aboriginal community in the Gulf of Carpentaria.
>
> He urged tribal elders to become more active in stopping child crime and in supervising probation and community-service orders.
>
> 'We have come not to pry but to inquire...not to punish but to judge justly,' he said.

> The Childrens Court of Queensland was set up in September last year with Judge McGuire appointed president by the Government.
>
> He heard six cases involving Aurukun juveniles yesterday – all involving charges of car stealing and break-ins.
>
> 'This is not a punitive exercise; we are here to learn – this is a voyage of discovery,' Judge McGuire said after arriving in Aurukun.
>
> 'We have come to learn and not to teach.'
>
> Judge McGuire said he hoped the 'visible presence' of the new children's court was a practical demonstration of the genuine interest the court had in Aurukun and other Aboriginal communities.
>
> 'We will be depending very heavily on the opinion of parents of these children and of the elders who command their respect to assist the court in coming to a fair and just decision.'
>
> Judge McGuire's first case involved a 14-year-old Aboriginal boy who had stolen a community council utility in March to go joy-riding with his friends.
>
> Proceedings were informal at times, with the boy's mother and grandfather invited by Judge McGuire to offer their opinions on the youth's behaviour.
>
> At one stage the boy, who pleaded guilty, sat beside Judge McGuire at the bench.
>
> On the advice of the boy's grandfather, Judge McGuire ordered the boy to be sent to Kalkie outstation near Aurukun on a year's probation to live with his relatives. No conviction was recorded.
>
> Townsville-based defence barrister Daniel Lavery told Judge McGuire young people in the community were faced with tremendous hardships including unemployment, poverty, severe housing shortages, alcoholism and sexually transmitted diseases.

The view I came away with was that the Aurukun people should have greater input into and control over the law-enforcement processes. It was thought that an Aboriginal Justice of the Peace should sit on Magistrates Courts to advise Magistrates.

In my considered opinion, processes whereby families are brought closer to and have some real control over decisions made by the Courts are highly desirable. Without family participation, decisions made by Courts will have little, if any,

beneficial effect. Responsible and respected leaders of the community should be empowered to participate actively in the juridical process and, in particular, should be afforded statutory recognition as approved supervisors of probation and community-service orders.

So far as I am aware, the only statutory recognition afforded elders of Aboriginal or Torres Strait Islander communities under the *Juvenile Justice Act 1992* is to be found in s. 14. Section 14, titled 'Caution administered by elder of Aboriginal or Torres Strait Islander Community', provides that:

> **14.(1)** If a caution is to be administered to a child who is a member of an Aboriginal or Torres Strait Islander community, the caution may be administered by a recognised elder of the community at the request of an authorised officer mentioned in section 13 (Conditions for administration of police caution).
>
> **(2)** In a proceeding, evidence that a person purported to administer a caution under subsection (1) as a recognised elder mentioned in the subsection is evidence that the person was a recognised elder.

It seems to me that the involvement of Aboriginal and Torres Strait Islanders in the judicial process is far too scant. It amounts to no more than tokenism.

At Aurukun I attempted to involve family and elders in the judicial process. I sought the advice of elders and family as to the appropriate disposition of the cases.

At Aurukun the most common offences committed by youths are: unlawful use of motor vehicles; breaking, entering and stealing; and also firearm offences. Juvenile offending is compounded by the lack of creative opportunities and the alcohol problem. The Aurukun Shire Council made an earnest attempt to address the problem by closing the beer canteen in April 1991. Liquor, however, is available in Aurukun.

Outstations

Because of the lack of creative opportunities and the drink problem in the township of Aurukun there has been a tendency to move away from the town to outstations. Since the mid-1970s homeland (or outstation) centres have been

established with the assistance of governments and other concerned bodies. People who choose to live on outstations are able to live an independent life free from the pressures and problems of town life. On the outstations there is greater scope to practice traditional values. The outstations are removed from the debilitating influence of alcohol, and family leaders exercise traditional authority over the extended families living there. Because of the constraints which outstation living necessarily imposes, crime, and especially juvenile crime, is virtually unheard of.

It is worthy of note that in all the cases I dealt with at the Aurukun Court the consensus of local opinion – coming as it did from family and elders – was that the offending child be placed on probation with a condition that he live on an outstation under the supervision of an elder of the family. Procedurally, I actively involved family and elders in the sentencing process. The increased use of homeland centres in recent times to correct offending juveniles can be seen as a hopeful sign that the more responsible people of Aurukun can be entrusted with certain aspects of law enforcement.

Aboriginal Assistant to the Court

I would like to see respected Aborigines empowered by law to supervise community-based Court orders. And I would go further. There should be created a position, designated 'Aboriginal Assistant to the Court', to act in an advisory capacity to the Magistrate or Judge sitting on a community Court. The visible presence in Court of an Aboriginal Assistant with advisory powers will, I think, be tangible evidence to the Aboriginal people of their own kin participating in the juridical processes of the law. Such visible participation should inspire greater respect for, and confidence in, the criminal justice system as it impinges upon Aborigines.

The proposal for the appointment of an Aboriginal Assistant to the Court is not put forward as a panacea. Indeed, there is no panacea. However, it should, among other things, have the incidental, and therefore good effect, of reducing the painful hostility of the Aboriginal people to the established system.

...

I did quite some time ago, in 1981, make a submission to the Australian Law Reform Commission, at the invitation of the Commission, on 'Aboriginal Customary Law – Recognition?'. The submission I made incorporates some of the proposals adumbrated above. The submission, however, covers a much broader spectrum. As the submission is apposite to the present discussion, I publish it hereunder.

23. Aboriginal Customary Law – Recognition?

Submission to the Australian Law Reform Commission, by McGuire DCJ, 7 May 1981.

MR DEBELLE: Good morning, ladies and gentlemen. I now open the Brisbane hearings of the Australian Law Reform Commission in connection with our inquiry into the recognition of Aboriginal customary law. This, I think, is something like the 29th hearing, or meeting, that the Commission has had in the past eight weeks. My name is Bruce Debelle and I am a member of the Australian Law Reform Commission and I am the commissioner in charge of this inquiry.

The proceedings will be conducted quite informally. I will only ask people to come forward and give their name and their address and the organisation they represent, if they in fact represent one. The proceedings will begin with some submissions from His Honour Judge McGuire of the District Court, and I have two other people who have made appointments later in the day. At 10.45 there will be the Young Liberals, and Mrs Carter from the Law Society at 11.30. But we can fit in anyone else who wishes to make any comment as necessary. The hearings will be lasting throughout the day.

Frederick McGuire:

MR DEBELLE: First of all, Judge, could I have your full name?

JUDGE MCGUIRE: Yes. Frederick McGuire.

MR DEBELLE: And your address is District Court?

JUDGE MCGUIRE: District Court, North Quay, Brisbane.

MR DEBELLE: Could I ask you, first of all, how long you have been a judge?

JUDGE MCGUIRE: Six years.

MR DEBELLE: And my understanding is that the District Court is the Court which, with the Magistrates Court, would hear the bulk of the criminal work?

JUDGE MCGUIRE: That would be true.

MR DEBELLE: Is there any limit on the criminal jurisdiction of your court?

JUDGE MCGUIRE: Yes. We cannot sentence beyond 14 years. In other words, we do not do capital charges, murder, rape, and the like. But we do do the bulk; I think we are the packhorse, if I can put it that way.

MR DEBELLE: Right. Thank you.

JUDGE MCGUIRE: I have read the Law Reform Commission's discussion paper with great interest. Let me say at once: it is a most comprehensive study of what I shall call, for want of a better word, the Aboriginal 'problem', or, as some may prefer, the Aboriginal 'question'. Although the paper is entitled, 'Aboriginal Customary Law – Recognition?', in its scope it is, I think, much wider than that.

The compilers of the paper deserve to be complimented. They have put both sides of the question – indeed, all sides – in what I consider to be a fair and balanced way. There has been no attempt to promote any particular point of view. In short, there is no bias, obvious or otherwise. It is not my purpose to go over areas already so sedulously canvassed in the paper, save as they may tend to illustrate a view I wish to express.

Some of the views I express may be thought to be unorthodox: unorthodox, it may be, to the point of being controversial. I make no apology for that. The views I express are personal to me. They are entirely my own. I have not consulted any member of the District, Supreme or Magistrates Court Benches, or any member of the practising profession, before formulating this submission. For any errors or misguided views, *mea culpa*.

But before I say more, I should lay my credentials on the line. I practised at the Central Bar for some 20 years until my appointment to the District Court Bench in early 1975. The Central Bar, as it is called, is centred in Rockhampton. The Central District, the boundaries of which are delineated by the Supreme Court Act of 1922, extends from, roughly, Mackay in the north, to Maryborough in the south, to Longreach in the west.

Within the Central District is the Warrabinda settlement. The Central District generally has its share of Aboriginal population. My years of practice included in its clientele people of Aboriginal descent. I have acted for scores, nay, hundreds, of Aborigines. My clientele has ranged from murderers to drunks – you name it. In my six years on the Bench I have tried and sentenced numerous Aborigines, principally in the circuit towns of Mt Isa and Cairns.

These being my credentials, Mr Commissioner, I now proceed to tell my tale.

I advocate a rationalisation of the existing systems of administering justice to Aborigines. I cannot go along with a proliferation of systems. In England, the bulk of summary jurisdiction is dispensed by unpaid Justices of the Peace, otherwise called Magistrates, sitting in over 1,000 courts designated Magistrates' Courts. There are some 16,000 lay Justices on the active list. By comparison, the number of Stipendiary Magistrates, the paid professionals, is exceedingly small. In 1963, for instance, the only year for which I can find a statistic, it was about 44.

Lay Justices are appointed by the Lord Chancellor on the recommendation of advisory committees for counties and boroughs, which are themselves appointed by the Lord Chancellor. It follows that much depends on having suitable persons as members of the advisory council. Strangely, the composition of the advisory committee is not published. It is kept secret.

In England, the Stipendiary Magistrate acts alone, whereas when lay Magistrates are sitting as a court of summary jurisdiction, the quorum is two, and frequently there are three or more. The advantage, it is said, of Magistrates Courts being constituted by two or more lay Justices is that, where there are doubts or differences of opinion, they may be settled by discussion. Judgment without discussion, as happens in a one-person court, is apt to be unreflective.

The difference between one-person and collective, or collegiate, justice, is thus implanted in the English lower court judicial system. Because the vast majority of Magistrates Courts in England exercising summary jurisdiction are composed of lay Justices, generally with no formal legal qualifications, whether academically acquired, or acquired through practice, the Justices have to be advised on the law applicable to the cases they adjudicate.

Justices are assisted by a clerk, usually a trained lawyer, known as the Clerk to the Justices. The position of the Justices' Clerk is a curious anomaly, the historic genesis of which lies in the need for lay Justices to have someone take a note of the evidence and advise on matters of law. This system offers both the technical knowledge of the professional clerk and the freshness, commonsense and knowledge of the world of the lay person.

Thus had arisen the peculiar situation in England that, whereas Justices are entrusted with the duty of deciding cases involving points of law, the repository of the technical savoir-faire necessary to decide the case according to law, is the Clerk, not the Justices. The Clerk normally advises the Justices behind closed doors, in the privacy of the Justices' chambers. Recent decisions of the Divisional Court have limited the right of a Clerk to retire with the Justices. Clerks can no longer retire with the Justices as a matter of course. They will be called in by the Justices only if they seek their advice on questions of law.

It has been suggested that the Clerk should, in the future, sit on the Bench with the Justices and be overtly a part of the collegiate, or deliberative body, actually deciding the case.

Now, Mr Commissioner, you may well ask, what has all that got to do with this?

MR DEBELLE: I think I am getting the drift, but I will let you explain.

JUDGE MCGUIRE: The foregoing is a purposeful preamble. It leads me by a process of analogy of reasoning to attempt to propound a scheme for the trial of Aborigines in criminal proceedings. I confine my proposals to Queensland, but the proposals, should they find favour with the law-makers, can easily be translated on a national scale.

There should be created a position designated 'Aboriginal Assistant to the Court'. 'Court' should be defined to mean Magistrates Court, District Court, Supreme Court and the Court of Criminal Appeal. One of the major problems confronting the administration of criminal justice in Queensland is physical. It is the tyranny of distance.

The most convenient division of the State, for present purposes, would be the adoption of the existing Magistrates Courts Districts.

The Attorney-General should appoint an advisory committee of three for each District. Two of the three should be Aborigines of good standing in their community. The third should be a non-Aborigine, preferably a cleric or a social worker. The composition of the committee, once appointed, should be published. The term of appointment should be no more than three years.

The prime function of the committee is to advise the Attorney-General on suitable persons for appointment to the position of Aboriginal Assistant to the Court. Only Aborigines should be recommended to the Attorney-General. The qualifying criteria for recommending a particular person should include (the criteria are not exclusive):

(a) His or her good standing in the community at large and, in particular, the Aboriginal community of that district. It is of paramount importance that he or she should have the confidence and respect of the Aboriginal community in which he or she lives.

(b) His or her knowledge and appreciation of Aboriginal customary law and practice in all, or most, of its ramifications.

(c) Literacy, although not essential.

(d) A willingness to serve on a paid part-time basis as required as an assistant to the Court involving the trial or sentence of an Aborigine.

A list of five suitable names should be furnished to the Attorney-General by the District advisory committee. The Attorney-General should appoint three as Aboriginal Assistants to the Court of that District.

In every case involving the trial or sentence of an Aborigine, at least one Aboriginal Assistant to the Court should be present in Court during the whole of the hearing of an Aboriginal criminal litigant's case.

The Aboriginal Assistant should not sit on the Bench unless invited by the Magistrate or the Judge for a particular purpose. He or she should sit below the Judge in the position presently occupied by the Judge's Associate or clerk.

An Aboriginal Assistant's function in Court should include:

(a) Explaining to the litigant the nature of the proceedings and his or her legal and constitutional rights. This should, of course, only be necessary if the Aboriginal litigant is not legally assisted. Nowadays, almost without exception in the District and Supreme Courts, Aborigines are legally represented pursuant to a Legal Aid scheme.

(b) In the case of illiterate, or uncomprehending, or reticent litigants, helping them express themselves in a way which is both fair to them

and intelligible to the court. See, in this connection, the remarks made by Wells J in the *Queen v. Williams* (1976) SASR 1, at pp. 6 and 7.

(c) Taking his or her own notes on evidence.

(d) Listening to the evidence with particular regard to the discovery of possible causes of the offence with which the litigant is charged which are, or may be, in his or her opinion, directly or indirectly referable to Aboriginal customary law, practice, or attitudes.

(e) With the leave of the Judge, putting questions to witnesses, including the accused, immediately relevant to customary law or ancillary thereto. Questions so put, and the answers thereto, will constitute a part of the record.

(f) In a trial or sentence matter in the Magistrates Court, retiring with the Magistrate before the decision is given and advising him or her on any aspect of customary law relevant to the case. A note of such advice should be taken and should constitute an integral part of the record of proceedings.

(g) In a trial matter in the District Court or Supreme Court, retiring with the Judge before he or she sums up to give advice on any aspect of customary law or practice relevant to the case. A note of such advice should be taken and should constitute an integral part of the record of proceedings.

(h) In a sentence matter in the District Court or Supreme Court, retiring with the Judge before he or she passes sentence to give advice on any aspect of Aboriginal customary law or practice relevant to the case. A note of such advice should be taken and should constitute a part of the record of proceedings.

(i) In an appeal matter before the Court of Criminal Appeal, if invited, retiring with the Court before it pronounces judgment and advising the Court on any aspect of Aboriginal Customary law or practice affecting the case, whether on conviction or sentence, or both.

The foregoing is not intended – and I stress this – in derogation of the right of either party to litigation, in an appropriate case, to call expert evidence on

Aboriginal customary law or practice. Nor is it intended to preclude the Judge, in a suitable case, from calling of his or her own motion an expert on customary law to assist in his or her deliberations. Presumably anthropologists will be called upon from time to time for this purpose.

As I have said, a note of the Assistant's advice to the Judge should be made. The Judge may accept or reject the advice. The Judge should state in open court, at the appropriate time, whether advice has been given, and whether he or she accepts or rejects it, and why. Generally, as I see it, such advice will go in mitigation of sentence. Where the advice goes to substantive issues, it is probable, in most cases, that other expert evidence will be adduced by one or other of the parties. The expert evidence will vary from case to case, but presumably, in many cases, the evidence will be given by anthropologists, preferably by anthropologists who have done considerable field work.

Now, having said that, it is realised that in many instances there will be no element of Aboriginal customary law involved. But the visible presence in Court of an Aboriginal assistant with the powers adumbrated above will, I think, be tangible evidence to the Aboriginal people of their own kin participating in the juridical processes of the law. Such visible participation should inspire greater respect and confidence in the criminal justice system as it impinges upon Aborigines.

The scheme I have devised is not put forward as a panacea. Indeed, there is no panacea. However, it may, amongst other things, have at least the incidental, and therefore good, effect of reducing the painful hostility of the Aboriginal people to the established system.

The proposals I make are embryonic. They are indeed a little crude, I will concede. They need considerable expansion and refinement. They may indeed, in some places, prove clumsy and unworkable. I refer here particularly to the day-to-day quick turnover of cases in the Magistrates Court. It may be, in the light of experience, that it would be impracticable to implement the proposed scheme in its entirety in that Court. Some accommodation or modification to the peculiar requirements of the Magistrates Court may be necessary.

Notwithstanding this possible drawback, I adhere to the overall concept of the scheme. I should like to see its integrity, if possible, unimpaired. It may be that a

number of Judges would resent this sort of intrusion on their hitherto exclusive domain. They would not want any sharing or derogation of authority.

MR DEBELLE: But, just to comment on that, it is really not terribly unlike a pre-sentence report, is it? It is really another factor to be taken into account by the Judge in the sentencing process. And the Judge would be carrying the ultimate responsibility for the sentence.

JUDGE MCGUIRE: One would hope so, but you see here we have the visible presence of a person who, by law, is entitled to advise the Judge.

MR DEBELLE: Yes.

JUDGE MCGUIRE: The other way it is only by invitation. There is that difference that you could make.

MR DEBELLE: Yes. I see your point.

JUDGE MCGUIRE: However that may be, I make the proposals with the utmost seriousness. I would urge a period of experimentation. In Queensland, if the scheme is not to be implemented as a whole, I would start first with towns like Mt Isa and Cairns, where a large proportion of the criminal litigants comprise Aborigines. The matter should be approached empirically at first. Improvements or modifications can be made in the light of lessons learnt.

Up until this time the participation of Aborigines in the actual juridical processes has been informal and ad hoc. I have read with great interest, in paragraph 118 of the Discussion Paper, the ad hoc attempts to involve Aboriginal elders in the outback and remoter parts of Australia in the decision-making processes affecting Aboriginal defendants. The efforts so far, however, in my opinion, are too piecemeal, too scattered and fragmentary and too informal to receive unqualified approbation. I think the idea of the consultative process between Magistrate or Judge and elder tribes people is a very good beginning. It needs building on and embellishing. As I have said, I would like to see the matter placed on a formal and universal footing. The cost factor, in my opinion, should not be allowed to act as a deterrent. If one offsets the possible gains against the possible cost, then I think the expenditure of public moneys would be well justified. In any event, I

am not myself convinced that the scheme would be over costly. I doubt whether it would put any undue strain on the public purse.

I leave that scheme, and I come now to alternations to the substantive law.

MR DEBELLE: Before you do, can I just perhaps put a thought to you? You did ask, after your explanation of the English process, where was this going to lead and I had one idea in mind which was quite different from that you ultimately put forward. What was occurring to me was that you could have a system whereby you would have Aboriginal Justices of the Peace in Aboriginal communities. You would have a system where you would have Aboriginal Justices of the Peace being advised by, in effect, clerks of court in relation to matters of law and so on as indeed they are in England. This could apply – they would have a similar jurisdiction to that exercised by white Justices of the Peace already in the Australian community. They could sit in towns such as Mt Isa as well as in Aboriginal communities, and they could sit either together or with a white justice, and there should be no reason perhaps why they should not deal with white offenders as well.

JUDGE MCGUIRE: Yes. Well, I do not – that is quite an acceptable possible alternative yes, but I do not –

MR DEBELLE: It is just that – I must say that I am thinking aloud.

JUDGE MCGUIRE: Yes.

MR DEBELLE: You stimulated another track in my mind.

JUDGE MCGUIRE: Yes, I twisted it around as you can see, because I think if you try too soon to effect too big a change you will meet with resistance which may prove insuperable.

Yes. To answer your question, I think the alternative you suggest is within the general conception I have in mind, but in practical terms and in what I consider not unimportant political terms, I think you may meet with undue resistance, whereas the scheme I am proposing, it seems to me, would probably have a better chance of being acceptable more immediately. Do you get the point?

MR DEBELLE: Yes.

JUDGE MCGUIRE: With one or two quite important qualifications I do not favour any change generally in the substantive criminal law to give formal recognition to Aboriginal customary law. However, I do favour formal recognition of customary law and practice in fixing penalty. The penalty imposed must be consonant with the Aborigines' conception of what is a fair thing. However, spearing and other forms of physical punishment inflicted on the wrongdoer by customary law in certain instances cannot, I think, be countenanced within the juridical framework of the law. Such concepts of punishment run counter to, and are repugnant to, present-day notions held by the general community of punishing offenders, black or white.

As I say, for myself, I am with two exceptions opposed to Aboriginal customary law impinging on the established substantive law. I agree with the sense of the statement in paragraph 141 of the paper that –

> It may be too facile to give wholesale approval to different standards for Aboriginal and white defendants.

Indeed, apart from being facile, it would, in my opinion, unduly complicate the administration of the criminal law. The whole tenor of my submission is that it is highly desirable from a pragmatic point of view, and also from a point of view of principle, that the substantive law should be universal in its application. Too much tampering within the established system could lead to invidious comparisons and discriminations between classes of people all living under a single Government. The first exception to the substantive law that I would permit is in relation to the law of provocation. Paragraph 142 of the paper argues this aspect in a way which I find unexceptional. Indeed, the modification of the strict law as to provocation is already enshrined in the case law of Australia and, it may be, England. On reflection, 'enshrined' may be too strong a word. Perhaps I should say that it has gained a tentative foothold in those countries.

In *Kwaku Mensah v. The King* (1946) AC 83, 93 the Privy Council, in a case of tribal killing, where provocation was raised, held:

> The tests have to be applied to the ordinary West African villager, and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable.

Generally, a verbal insult, no matter how bad, is not sufficient provocation in law to reduce murder to manslaughter. In *Moffa v. The Queen* (1977) 51 ALJR 403, Barwick CJ was moved to say, at page 404:

> I must say that circumstances do alter cases and that such an unqualified rule is hardly consonant with the 'benignity of the law' in its concession to 'human infirmity'.
>
> (Foster, *Discourse II on Homicide* (2nd ed.), p. 255.)

In Moffa's case the appellant was a man of Italian descent who migrated to Australia as an adult. He married an Australian woman. His wife taunted him with sustained remarks of a very personal nature. In the result, he lost control and killed her. Chief Justice Barwick carried the majority of the court into holding that provocation was open to the appellant in those circumstances.

The Chief Justice said at page 404:

> That he was emotionally disturbed by his wife's disclosed attitude to him did not make him, in my view, other than an ordinary man: and, in particular, other than an ordinary man of his ethnic derivation. If the use of the word 'reasonable', in the statement of what is called the objective test in relation to provocation, would exclude from consideration such emotional reactions, I have even greater reason for preferring the description 'ordinary man' in the formulation of that test.

Then, Mr Commissioner, last and not least, I refer to the case of the *R v. Rankin* (1966) QWN 10, of which I have some personal knowledge. I acted for Rankin. The headnote to the case report reads:

> An aboriginal to whom *The Aboriginals Preservation and Protection Acts, 1939 to 1946* applied, and who lived in an aboriginal settlement, was tried on a charge of wilful murder. The question arose as to the manner in which the jury should be directed on s.304 which had been raised by the defence.

The facts are not set out sufficiently in the report. Rankin lived at the Warrabinda settlement. He was an inmate of that reserve, living under the rules which governed reserves at that time (1966). One Sunday he, with others, was allowed out to play cricket at a town called Duaringa. During the day he mixed his cricket with wine and beer, and came home rather the worse for wear. When he arrived home one of his best friends made a gratuitous insult of a very personal and offensive nature about his wife's disreputable conduct during his absence at the cricket match. Rankin was very intoxicated. He walked from where they were

talking to the wood heap some 10 metres away, picked up an axe, took the 10 paces back, and unceremoniously hit his friend over the head with the axe. He fell, never to rise again. They are the facts.

Now, I made this submission, which is reported in the case report. I submitted that to equate a protected Aborigine domiciled in a settlement set aside for the welfare of Aborigines under the Aboriginals Preservation and Protection Acts with the rational, reasonable man in the general community, for the purpose of determining whether, in the case of an indictment for wilful murder allegedly committed against a fellow Aborigine on the settlement, there is sufficient evidence of provocation fit for the consideration of the jury, would deprive the Aborigine of an effective defence because the standard of behaviour which would induce an Aborigine so placed to lose his power of self-control is different from the standard applicable in the general community. Although there is no reported case in Queensland to support this proposition, it is one of ordinary good sense.

Mr Justice D.M. Campbell, in a short judgment, simply said:

> The question arises in this case, where an Aboriginal who comes under *The Aboriginal Preservation and Protection Acts, 1939 to 1946* is on trial charged with wilful murder, as to the test which should be applied in determining whether there was sufficient provocation. It is well settled that there must be such provocation as temporarily to deprive a reasonable man of the power of self-control as a result of which he commits an act which causes the death before sufficient time has elapsed for his passion to cool.
>
> The accused was born at the Aboriginal settlement at Woorabinda in Central Queensland, where he has lived most of his life, and it was there that the alleged crime was committed. I propose to direct the jury that the question which they must consider is whether the provocation was sufficient to deprive an ordinary Aboriginal who lives in an Aboriginal settlement of his power of self-control. A cross-section of such Aboriginals appeared before the jury and gave evidence.

The second exception to, or modification of, the substantive law I would admit of is also in the case of murder. Because under Australian law the mandatory punishment for murder is either life imprisonment or death, I think, where there has been an Aboriginal tribal killing, under and in accordance with established tribal customary law, the law should treat this as a case of diminished

responsibility. Diminished responsibility is defined in section 304A of the Queensland Criminal Code as follows:

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute...murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only.

My proposal is this. I would amend section 304A of the Criminal Code by adding a new subsection (1)(a) to this effect:

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is, at the time of doing the act or making the omission, an Aboriginal acting under and in accordance with established Aboriginal tribal customary law which he or she accepts and feels bound by, that person is guilty of manslaughter only.

In this way the Court, on conviction for manslaughter, would have flexibility of sentencing.

Subsection (2) of section 304A provides that the onus of establishing diminished responsibility is on an accused person. I would retain that.

For myself, I would much prefer the suggested defences of mistake and duress, mentioned in paragraphs 143 and 144 of the paper, to be brought under the umbrella of diminished responsibility rather than promoted as separate and distinct justifying pleas to reduce murder to manslaughter. I agree with what is said in paragraphs 143 and 144 of the paper that pleas of mistake and duress could in certain circumstances be squeezed sideways into the law of provocation. But I prefer the other course.

Now, there is a further reason why I suggest this modification of the substantive law. Under the common law of England, the Court insists on maintaining control over criminal proceedings, once formally before it.

A charge reduction from, say, murder to manslaughter may not be countenanced by an English Court. For example, in *R v. Soanes* (1948) CrAppR 136 of the Court of Criminal Appeal said:

> While it is impossible to lay down a hard and fast rule in any class of case on when a plea for a lesser offence should be accepted by Counsel for the Crown – and it must always be in the discretion of the Judge whether he will allow it to be accepted – in the opinion of the Court, where nothing appears on the depositions which can be said to reduce the crime from the more serious offence charged to some lesser offence for which a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment, leaving it a matter for the jury, if they see fit in the exercise of their undoubted prerogative, to find the verdict of guilty of the lesser offence only.

A very recent example of the same thing was in *R v. Sutcliffe* (the Yorkshire Ripper case). At the opening of the trial the Attorney-General, Sir Michael Havers, indicated to the Court that the Crown would accept pleas of guilty to manslaughter on the grounds of diminished responsibility on an indictment charging 16 counts of murder. The trial Judge, applying Soanes, refused to accept pleas to the lesser offences and directed that the trial proceed on the offences of murder. It is now history that the jury (by a majority of 10 to 2) returned a verdict of murder.

It is because in some Australian States, where the common law of England applies, a beneficent Crown may find itself frustrated by an uncompromising Court where the Crown is willing to accept a plea to a reduced charge from that indicted (such as manslaughter for murder) that I suggest the introduction of legislation (where appropriate) similar in terms to my proposal above for the amendment of Section 304A of the Queensland Criminal Code.

But it should be noted that in some jurisdictions, by legislative intervention, the Crown can accept a plea to a reduced charge without approval of the Court. *Vide*, for example, Section 394A of the Crimes Act (NSW), and Section 598(1) of the Queensland Criminal Code.

Section 394A of the Crimes Act (NSW) provides that:

> Where a prisoner is arraigned on an indictment for any offence and can lawfully be convicted on such indictment of some other offence not

> charged in such indictment, he may plead not guilty of the offence charged in the indictment, but guilty of such other offence, and the Crown may elect to accept such plea of guilty or may require the trial to proceed upon the charge upon which the prisoner is arraigned.

And Section 598(1) of the Queensland Criminal Code provides that:

> If the accused person does not apply to quash the indictment (or move for a separate trial of any count or counts of the indictment), he must either plead to it, or demur to it on the ground that it does not disclose any offence cognizable by the Court. If he pleads, he may plead either –
>
> (1) That he is guilty of the offence charged in the indictment, or, with the consent of the Crown, of any other offence of which he might be convicted upon the indictment;
>
> ...

I deal next, briefly, with the second of the Commission's terms of reference: recognition of Aboriginal customary law for sentencing purposes. I think you understand my attitude to this, but I will state it precisely. I am fully in accord with the view that Aboriginal customary law, where it applies, should be a mitigating consideration on sentence. I make no qualification of that statement.

I will not dilate; I will not take up any more of the Commission's time. I did want to say something about the correlation between drink and the commission of offences, and the correlation between drink and customary law. It seems to me that the people living truly tribally do not as a general rule have access to drink, and that therefore true tribal killings are not drink related. Ironically, however, most of the serious offences being committed nowadays by Aborigines, which are said to be tribal, are, it seems to me, to a large extent influenced by intoxication.

I can do no better, I think, than finish by repeating my remarks on sentence made in Mt Isa in 1979 following the conviction of one Kevin Little, a tribal Gulf Aborigine, for wilful destruction of property:

> I feel for your plight. Your background is against you. Despite your inexcusable wrongdoing I think I should treat you with some semblance of humanity. I propose to place you on a good-behaviour bond for two years and to order restitution for damage to property. Time and again we see in these Courts stark examples of the effects of alcohol on Aborigines. Somehow, somewhere, some time, someone has to rescue the Aboriginal

> people from alcoholic annihilation. It is, I think, misplaced benevolence for governments to put money into their hands, and to stop there. There is a need – I think a great and urgent need – to institute some minor public works program in town areas like Mt Isa where Aborigines congregate in quantity so as to keep them usefully occupied and to offer them the dignity of labour, thus forestalling mischievous idleness which brings in its wake almost hourly resort to the demon drink.

I do not think I can usefully assist the Commission any further, Mr Commissioner.

MR DEBELLE: Thank you very much indeed.

24. THE MORAL DIMENSION

We search for answers to the present child crime problem. I have randomly collected under the rubric 'The Moral Dimension' the distilled views of some contemporary thinkers, opinion formulators and legislators. This is an edited version of what they say:

1. Damien Grace, University of New South Wales, *Sydney Morning Herald*, April 11, 1994:

Moral authority is now vested in the individual rather than in communities and in institutions.

It is true that State, society, church and school could do more about moral education. But it is not clear that we want them to. Our kind of society does not like people telling us what to do or public institutions expounding morality.

The churches, for example, are often criticised for not taking a moral stand, but when they do they are accused of being authoritarian, out of touch, or interfering in politics. Witness the response to the Pope's recent encyclical: with a quarter of the population being Catholic one might have expected a better reception from people looking for moral leadership. Instead the document was criticised by people who did not read it.

What hope have the traditional instruments of oral instruction in imparting values when individual preferences displace institutional moral authority?

When moral values are regarded largely as a matter of individual responsibility, there is an increased emphasis on legal regulation of conduct and less recognition of custom and traditional values. But statutory rights and liberties are not substitutes for belonging to a family, a church or a community with a sense of responsibility to others these entail.

Morality viewed merely as an instrument for controlling people's behaviour is unworthy of the name. Morality is not about conformity, but about developing those personal excellences once familiar to us as the virtues. It should not be equated simply with prohibitions or a list of obligations. It is also about courage, generosity, patience, trust and love – the kind of qualities we can acquire only in our relations with others. Moral leadership is about exemplifying excellence.

Ethics are not optional: they make us good individuals and prevent us from becoming less than we would otherwise be. While murders of innocents like James Bulger or the citizens of Bosnia will always remain,

like the Holocaust, outside the understanding of everyday life, our reactions to such horrors show that we feel some strong moral stake in them and some responsibility for preventing their recurrence. Those reactions are also signs that something missing in our own social life needs restoration.

2. Janet Daley, columnist, *The Times*, November 26, 1993, July 7, 1994:

Children are capable of being random, aimless and without conscience if they are left to their own devices, that is to say without the constant, tireless surveillance and moral control of adults.

Instructing the young to suppress their innate evil impulses is the individual and collective responsibility of adults. Without constant supervision (and the kind of moral instruction now regarded as authoritarian) the young can and will run amok into amoral, sadistic egoism.

If Britain shares the blame for the murder of James Bulger, it is not because of particular social conditions which are shared by many who do not torture toddlers to death. It is for the much more subtle abdication of responsibility: a wilful dismantling of any absolute sense of right and wrong. Parents, teachers and public authorities once supported each other to present a united front against the universally acknowledged presence of evil.

If we are 'all guilty', it is of refusing to accept the naturalness of evil and that all adults – even the reluctant and cowardly – must be held responsible for keeping it in check.

Western societies (such as the United States and revolutionary France) which deliberately cut religion away from the State have done so in the name of civil liberty – an idea which had been passed down to them through their religious history. And the United States has had to replace the role of religion in schools with a sinister cult of patriotism and flag-worship.

But what does our modern, secular society need with formal theological teaching anyway? Why not avoid the clashing of contradictory cultures by dropping all religious training in schools? Because to do so would be to break the historical continuity which makes sense of our present moral beliefs – such as the value of tolerance. It would be one more abdication of our responsibility to instruct the young in moral principles. And that is best done in two ways: by example and by parable. For both of which, the teaching of religion is hard to beat.

(As I apprehend her, the author uses 'religious training' in the widest sense to include all cultural moral codes).

3. Anthony O'Hair, Professor of Philosophy at Bradford University, *Courier-Mail*, November 27, 1993:

Too often the parent finds it easier to give in – easier emotionally, and intellectually more in accord with their romantic view of childhood. In such cases the child's will is stronger than the parent's; but in conceding to the child, a terrible harvest is sown. Our insidious self-deception about ourselves skews our attitude to children. It leads us to value their self-expression and passing happiness over self-discipline and long-term good.

Children are unformed human beings. They are creatures of promise, though already capable of many things both good and bad, even in their unformed state. In growing up, children need understanding of their own complexities, protection against their bad selves, and informed guidance, not an easy know-nothing permissiveness.

4. Lew Kuan Yew, former Prime Minister of Singapore, *Time Magazine*, April 18, 1994; *The Weekend Australian*, April 2–3, 1994:

Change is unavoidable, but that need not dissolve your way of life. Whether you can maintain your basic values depends on whether you are able to maintain your basic family network. If you can't, you are in trouble. The main building block of the community is the family unit.

You must have discipline at home. You must have certain values respected. The schools can only supplement what the home does. The Government can set the parameters, but the thrust must come from the home. Certain basics about human nature do not change. Man needs a certain moral sense of right and wrong.

We take a different approach from Western society. We believe the business of Government is to provide individuals with what they cannot provide for themselves: a safe and stable society for a secure life. Therefore we had to take strong measures to make sure people understood that other people's lives and property have to be respected.

Asian societies are unlike Western ones. The fundamental difference between Western concepts of Government and society and Eastern concepts is that Eastern societies believe that the individual exists in the context of his family. He is not pristine and separate. The family is part of the extended family, and then friends and the wider society. The ruler or a Government does not provide for a person what the family best provides.

We start with self-reliance. In the West, today, it is the opposite. Westerners have abandoned an ethical basis for society, believing that all problems are solvable by good Government, which we in the East never believed possible.

As a total system I find parts of American society totally unacceptable: guns, drugs, violent crime, vagrancy, unbecoming behaviour in public – in sum, the breakdown of civil society. The expansion of the right of the individual to behave or misbehave as he pleases has come at the expense of an orderly society. You must have order in society. Guns, drugs and violent crime all go together, threatening social order.

I would hazard a guess that what has gone wrong with the U.S. has a lot to do with the erosion of the moral underpinnings of society and the diminution of personal responsibility. The liberal, intellectual tradition that developed after World War II claimed that human beings had arrived at this perfect state where everybody would be better off if they were allowed to do their own thing and flourish. It has not worked out, and I doubt if it will.

We have this cultural backdrop, the belief in thrift, hard work, filial piety and loyalty in the extended family, and, most of all, respect for scholarship and learning.

History in China is of dynasties which have risen and fallen, of the waxing and waning of societies. And through all the turbulence, the family, the extended family, the clan, has provided a kind of survival raft for the individual. Civilisations have collapsed, dynasties have been swept away by conquering hordes, but this little raft enables the civilisation to carry on and get to the next phase.

5. Peter Robinson, columnist, *Sun Herald*, April 24, 1994:

'Law and order' is a platitude which in itself has either no meaning or any meaning the listener might like to draw from it.

It is simply an emotional trigger which enables many well-intentioned people to wring their hands about the crime rate, drugs, violence, contempt of traditional values, and so on.

The usual corollary of that perception is more police, tougher judges, more jails and longer sentences. Many Australians from every social category were sagely nodding their heads in agreement with Singapore's Lee Kuan Yew when he boasted how clean, safe, socially correct and crime-free his personal paradise is.

Yet both these attitudes miss the point.

The decline of law and order has little to do with policing or common crime, but, rather, is the erosion of firm and generally accepted community standards, clearly adhered to by an overwhelming majority of citizens, taught in schools and regarded not as onerous or restricting but as conforming and decent.

It has been proved over and over again both here and in places like Britain and the U.S. that secure and happy communities do not spring from guns and truncheons of policemen or the mouths of 'hanging judges'. They have their roots in good education, a strongly inculcated sense of ethics, and the decent example of older generations.

6. Dr Jonathon Sachs, Chief Rabbi of Britain, *The Times*, December 3, 1993, May 31, 1994:

There must be an honest recognition of the threads of collective responsibility that make society more than an aggregate of individuals. Together we form a moral entity. 'Any man's death diminishes me', said John Donne.

Morality begins with law, and law is predicated on individual responsibility.

For some time now there has been a perceptible change in the language of western politics. A new agenda for the 90's is beginning to form. Its themes are the family, the community, and a renewal of the bonds of interconnectedness that make up civil society.

In the past there has been an over-insistence on rights at the expense of responsibilities. What is now needed is the politics of duty. There is need to recapture the sense of duty. How is this to be achieved? By law? No, law alone does not provide the answer. Law is the crudest of all instruments of moral education. Laws can prevent us from doing evil, but they cannot make us good. Nor in a free society can laws do more than enforce the morality we have. They cannot recreate a morality we have lost.

'Duty', said Lord Acton, 'is not taught by the State'. But the State can empower other groups to do so. The transition from rights to duties is possible. It is urgently necessary if we are to preserve our law-governed liberty. But it will happen through the agents of moral change in our society, not through the brute force of law. It should be acknowledged that Governments alone cannot change people. There are other agents of change in society. They include religious leaders and educators – and, above all, the family.

We have tolerated the collapse of the family. We have done so in the name of personal fulfilment, sexual liberty and the inalienable right to follow our desires. No abdication has had more fateful consequences.

In the name of tolerance we have taught that every alternative lifestyle is legitimate and that moral judgment is taboo, even 'judgmental'. What is right becomes what does no harm others, and in time degenerates to what I feel like doing and can get away with.

We have allowed the social stigma attaching to absconding parents to disappear, assuming that their place can be taken by the State. But the State is not a person, and it is from people – especially parents – that we learn what it is to be moral. The result is lawless children who have to be restrained because they have not learnt restraint.

We have given our children no framework within which to learn civic virtue and responsibility. We must devise ways by which service to the community becomes every child's experience of the growth to adulthood. Morality is taught by being lived. It is learnt by doing. Community work is more powerful than any formal moral instruction.

The sense of belonging to a long term project, society, of which we are the collective guardians for the sake of our children, has suffered an eclipse. But it need not be permanent. There is no lack of desire among young people to serve. What they lack is the framework in which to do so. If community work were to be part of the national curriculum, and if religious groups, voluntary organisations and local associations were enlisted in training for citizenship, a new and practical expression could be given to civic duty. It is a supreme irony that we treat community service as a punishment instead of a universal and challenging part of education.

Family and community have eroded as institutions. Our range of commitments has narrowed and our historical horizons become foreshortened. It is necessary to focus attention on the birthplace of responsibility: families and communities. It is in these intimate associations that we learn and practice responsibility, understand the mutuality of the social bond and discover the power of the good we seek in common.

7. President Clinton's State of the Union Address, February 22, 1994. In his State of the Union address, President Clinton devoted about one quarter of this historic address to crime. He said:

Every day the National peace is shattered by crime... Violent crime and the fear it provokes are crippling our society, limiting personal freedom and

fraying the ties that bind us...We must recognise that most crimes are committed by a small percentage of criminals who too often break the laws even when they are on parole. Now those who commit crimes should be punished, and those who commit repeated violent crimes should be told when you commit a third violent crime, you will be put away, put away for good, three strikes and you are out. We must take serious steps to reduce violence and prevent crime, beginning with more police officers and more community policing. We know right now that police who work the streets, know the folks, have the respect of the neighbourhood kids, focus on high crime areas, we know that they are more likely to prevent crime as well as catch criminals.

...

The problem of violence is an un-American problem...as you demand tougher penalties for those who choose violence, let us also remember how we came to this sad point. In our toughest neighbourhoods, on our meanest streets, in our poorest rural areas, we have seen a stunning and simultaneous breakdown of community, family, and work, the heart and soul of civilised society. This has created a vast vacuum which has been filled by violence and drugs and gangs. So I ask you to remember that even as we say no to crime, we must give people, especially our young people something to say yes to.

Many of our initiatives, from job training to welfare reform to health care to National Service will help to rebuild distressed communities, to strengthen families, to provide work, but more needs to be done.

...

Our problems go way beyond the reach of government. They are rooted in the loss of values and the disappearance of work and the breakdown of our families and our community. Fellow Americans, we can cut the deficit, create jobs, promote democracy around the world, pass welfare reform and health care, pass the toughest crime bill in history and still leave too many of our people behind.

The American people have got to want to change from within if we are going to bring back work and families and communities. We cannot renew our country when, within a decade, more than half of the children will be born into families where there has been no marriage. We cannot renew this country when 13-year-old boys get semi-automatic weapons to shoot 9-year-olds for kicks. We can't renew our country when children are having children and the fathers walk away as if kids don't amount to anything.

...

We can't renew our country until we realize that governments don't raise children; parents do. Parents who know their children's teachers and turn off the television and help with the homework and teach their kids right from wrong – those kinds of parents can make all the difference. And I'm telling you we have got to stop pointing our fingers at these kids who have no future and reach our hands out to them. Our country needs it. We need it. And they deserve it.

And so I say to you tonight, let's give our children a future. Let us take away their guns and give them books. Let us overcome their despair and replace it with hope. Let us, by our example, teach them to obey the law, respect our neighbors, and cherish our values. Let us weave these sturdy threads into a new American community and once more stand strong against the forces of despair and evil because everybody has a chance to walk into a better tomorrow.

8. Mr Wayne Goss, Premier of Queensland, Address to State Conference, June 28, 1994:

Increasingly we face a new, disturbing problem as a community. As we all know, the incidence of juvenile crime, especially street crime, is too high.

Too many young people are turning away from the family and social values that have long been accepted as an integral part of our community.

However, when it comes to preventing crime there is only so much that Governments can do.

This is a community problem and there is a wider community responsibility and obligation.

Remember, for every street kid breaking into a house or car, there are parents who are responsible for the welfare of that youth.

Ultimately it is up to the whole community and to every family to accept their share of responsibility for the community in which they live.

We owe it to the significant number of young people who feel left behind to positively encourage them; to do all that we can as a community to provide the environment and positive alternatives that discourage crime and antisocial behaviour.

This is not a role that is well suited to Government, although Governments can play an important part in helping with the provision of facilities and resources.

Crime can be the product of economic circumstances; but it can also be the product of a deterioration of community values – values which attach importance to the physical security of other people and that of their property.

Governments cannot construct the values of a community or of individuals within it.

These values can only be constructed and nurtured by the community itself.

Let us accept that none of us has all of the answers.

Let us accept the difficult challenge of understanding that, while we cannot shirk our responsibility to mete out punishment where antisocial behaviour warrants it, punishment alone is not the answer.

I am calling on the community organisations, the churches, neighbourhood watch groups, sporting clubs and local government to help, to work in partnership with the Government to rebuild the social fabric of local communities, especially the opportunities for young people within them.

When we come to make decisions let us remember that as a community there are times when we have to look at ourselves and, rather than turn our backs, put our arm around our youth and keep them part of our community.

9. B.A. Santamaria, columnist, *The Weekend Australian*, January 29–30, 1994:

Despite the pill, condoms, sterilisation and what have you, children still keep being born. But the environment in which they are nurtured is changing. Although in 97 per cent of sole-parent families both mother and father are still alive, about 700,000 dependent children now live with one parent alone.

Does this improve their psychological preparation for life? Apparently not.

'A lot is going wrong with children', writes Dr. Don Edgar, recently retired director of the Institute of Family Studies, 'because there is not enough time to deal with them. They are shunted into Kentucky Fried Chicken childcare centres. Early child development is being neglected and you can see the consequences of it now in children's behaviour problems.'

Another aspect of family life that does not suit children, says Dr. Edgar, is divorce: 'I disagree with the dogma that says divorce doesn't damage children. Children in one-parent families clearly do well overall, but most

of them are still living in poverty. People tend to forget that divorce disrupts children and that divorce produces poverty for women and children, and both of those are very damaging for children in the long term.'

One product of the new social pattern is the rapidly increasing number of homeless children who, deprived of family support, fall increasingly prey to drugs, abuse of every kind and crime.

Strangely enough, while all of these problems are difficult to solve, none is ultimately impossible. The obstacles lie not in our stars, but in ourselves.

10. Sir Walter Campbell, former Governor of Queensland, Address at opening of an Art Exhibition, All Saints Church, April 29, 1994:

One does not simply have nostalgia for the 'good old days' when one recalls that there was a time when, if things went wrong, as it were, the trouble was then kept and fixed within the family. Nowadays, we have the situation where family problems have become so numerous and so complex, and the family itself is so fragmented, that we have intervention from Government, and outside support sought and given from many types of welfare agencies. Those of my vintage have seen the development of the welfare society which has led to an expectation that one will be looked after by Government from cradle to grave.

Bureaucratic rules and regulations have taken over much of the former customs and patterns of family living. This central and outside regulation and control may be based on good intentions and may, in some cases, produce more comfortable and better outcomes for some people, but it has also led to the abrogation of many of the satisfying and worthwhile functions and responsibilities of the family group.

One cannot help but feel a sadness for the going away or the loss of a closer relationship between law, on the one hand, and religion and morals, on the other. The family is the nucleus of society and there exists, together with the family unit, its dwelling place, or the family home. Of course, there are tensions and stresses between members, but is it not better that these things be generally managed and fixed up within the family itself? With the notion of the extended family there are people of all ages with different experiences and knowledge to share and to advise on the worries and anxieties.

That great English lawyer, Lord Denning, once said: 'If religion perishes in the land, truth and justice will also.

...'

There is a remarkable conformity of view among these thinkers, opinion formulators and legislators as to the answer to the moral dilemma: the moral dilemma can only be resolved by an acceptance of the moral imperative. What is needed is a moral renaissance, a moral reawakening, a return to the good and the right way – in short, a restoration of ordinary goodness.

Governments cannot change people, any more than Courts can. Moral authority rests with families and communities which are the repositories of responsibility. A law-enforced morality has never in the history of humankind succeeded. As Dr Sachs so profoundly points out, laws can prevent us doing evil but they cannot make us good. So, too, with the Courts. Courts see the end result of criminal activity and must deal with it as best they can. Courts cannot make people good or more responsible to one another. Courts, however, are necessary expedients. We are all subject to the discipline of the law. 'Be you ever so high, the law is above you', said Thomas Fuller over 300 years ago. Law-abiding citizens look to the law to protect them from those who would disrupt, disturb and diminish their peaceable and orderly existence.

In my experience, one of the chief causes of juvenile crime is family breakdown. As the Archbishop of Canterbury, Dr Carey, on a recent visit to Merseyside soon after the horrific James Bulger case, pertinently observed:

> For children, the family is by far the most important influence for good or ill, though by no means the only one. It is extremely difficult to learn to be good without the love, support and guidance of parents...If we want to stop young children roaming the streets causing harm to themselves, it is above all the parents who must be challenged and helped...
>
> If morality continues to become a mere matter of individual opinion, our society will continue to disintegrate. I sense a gathering current of opinion which holds this individualization of belief and morality to be a public disaster of gigantic proportions, at the levels of individual, family and wider collective behaviour. If right and wrong become relative to each person's individual instincts and calculations, society loses its cohesion.

Poor parental supervision, harsh, neglectful or erratic discipline, parental discord and having one parent with a criminal record, are, I believe, among the main childhood factors consistently and significantly linked to later teenage offending.

However, as English author, David Utting, a research fellow at the Family Studies Centre, points out:

> It would be ridiculous to lay all the blame for rising crime at the feet of parents. But there is reason to believe that raising children has become a more difficult task which today's parents carry out in greater isolation from support that was once available from the extended family. Whether we are talking about children living with two parents, one parent or in step families, it is clear that affectionate parenting and consistent discipline help protect against acquiring a criminal record.

I leave the last word on the moral dimension to that great jurist, Lord Denning:

> In any discussion of punishment it is important to recognise, as Christianity does, that society itself is responsible for the conditions which make criminals...The child who has lost his sense of security feels that he must fight for his interests in a hostile world. He becomes anti-social and finally criminal. The broken home from which he comes is only too often a reflection of society itself, a society which has failed to maintain its standards of morality. When we try to reform a criminal, we are only treating the symptoms of the disease. We are not tackling the cause of it...Nevertheless, although society is largely responsible, neither religion nor the law excuses the criminal himself. Christianity has always stressed the responsibility of each individual for his own wrongdoing. (*Lord Denning – A Life*, Iris Freeman, Hutchinson, London, 1993, p. 214).

For myself, I agree with Lord Denning that justice is not a product of the intellect, but of the spirit. Unless morality permeates the law, there can be no true justice. For without morality there can be no just law. Indeed I would go so far as to echo the sentiment of Lord Denning that if religion perishes in the land, truth and justice will also. 'We have already', he says, 'strayed too far from the faith of our fathers. Let us return to it for it is the only thing that can save us.'

As we lawyers are wont to say: With respect, I agree.

25. PENULTIMATE REFLECTIONS

In the last 100 years many dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society. The result has been the creation in this country of a system of juvenile courts.

There can be no denying that in some areas the performance of these Courts has fallen disappointingly short of the hopes and expectations of the altruistically minded people who pioneered their creation. For a variety of complex reasons, the reality has not even approached the ideal. Much remains to be accomplished in the administration of juvenile Courts – in personnel, in planning and in financing.

26. CONCLUSION

The proposals I have made in this report for the improvement of the Juvenile Justice Act are, I think, all constructive ones. I have done no more than make what I consider helpful suggestions for enhancing the legislation by drawing attention to matters which could be improved upon in the light of experience. In short, what I have attempted is a review of the legislation after a year of its life.

It should be recognised that all legislation is most difficult to frame; it cannot hope to appease all points of view. First of all, there has to be a dominant or underlying policy. Secondly, that policy must be enunciated in the language of a statute. It is inevitable that some flaws, anomalies and lacunas in the legislation will be discovered through the empirical process.

For the year under review, notwithstanding the deficiencies in the legislation to which I have alluded, I have, on the whole, been well content with the efficacy of the legislation. In its day-to-day application I think it has worked reasonably well. I am far from dissatisfied with the achievement to date. Indeed, I think it has been significant.

We must proceed with patience and perseverance, with pertinacity of purpose, but above all with hope and vision – for 'Where there is no vision the people perish' (Proverbs 29:18).

At the beginning of this report I likened the journey we were undertaking together to a pilgrim's progress. We have gone so far on the journey; there is still a long way to go. We have pulled ourselves out of the 'Slough of Despond', but we still have many trials and tribulations to suffer before we reach the pilgrim's final destination: the Celestial City. Like Christian in *The Pilgrim's Progress*, when asked by Evangelist: 'Do you see yonder shining light?', I believe I can answer, 'I think I can'.

27. ACKNOWLEDGEMENTS

This self-regardant picture throwing the main light upon myself is unfair to the many dedicated and lonely fighters of child crime and the conditions responsible for it, both in and out of the bureaucracy, to whom the public are indebted. Although I have taken upon myself a mock primacy, in truth my proper share is a minor one. The credit, if there is any, goes to those dedicated and lonely fighters who, by and large, remain unheralded and unsung. It would, however, not be proper for me to conclude this report without acknowledging those who have most helped and encouraged me in the performance of my responsibilities as President of the Childrens Court of Queensland.

I gratefully acknowledge the courtesies extended to me by: the Honourable the Attorney-General, Mr Dean Wells; the Honourable the Minister for Family Services and Aboriginal and Islander Affairs, Ms Anne Warner; the Director-General of the Department of Justice and Attorney-General, Mr Barry Smith, and his successor, Mr Brian Stewart; the Director-General of the Department of Family Services and Aboriginal and Islander Affairs, Ms Ruth Machett; the Honourable the Minister for Police and Corrective Services, Mr Paul Braddy; and the Police Commissioner, Mr J. O'Sullivan.

I wish to place on record my grateful thanks to the three other Childrens Court Judges – Senior Judge Trafford-Walker in Townsville, Senior Judge Hanger in Southport and Judge McMurdo in Brisbane – for their sterling efforts, cooperation and sage advice over the past year.

I should also like to pay a generous tribute to the Queensland Magistracy, who continue to do the bulk of Childrens Court work, for their loyal support and cheerful discharge of duty. Of the magistracy, it would be remiss of me if I did not single out for special mention Mr Pat Smith, the Brisbane Childrens Court Magistrate, whose prodigious output, patient perseverance and unstinting assistance to me have contributed significantly to the successful implementation of the new legislation.

I should not fail to mention the debt of gratitude I owe to my devoted clerk, Mr Cameron Dean, who accepted the increased burden of work imposed by the new jurisdiction dutifully and without complaint.

Also worthy of meritorious mention are the Executive Director of Courts Division, Mr David Hook, the Supreme Court Librarian, Mr Aladin Rahemtula,

the Court Administrator, Mr Garry Robinson, the typists of the Secretariat, Mrs Noela Fulcher, Mrs Therese Bunyan and Ms Bev Morgan, and Senior Communications Officer Janita Cunnington, without whose most appreciated support this report would not have seen the light of day.

And last but by no means least, I humbly acknowledge the encouragement, interest, assistance and advice the Chief Judge of District Courts, Judge Shanahan, has given me personally and the Childrens Court of Queensland, which comes under his general province as Chief Judge of District Courts. I look forward to a continuance of his good graces towards the Court.

28. SUMMARY OF RECOMMENDATIONS

RIGHT OF ELECTION

1. That 'serious offence' be redefined to mean –

   (a) a life offence; or

   (b) an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for seven years or more.

2. That the right of election (which applies only for serious offences) be abolished and children committed on serious offences be committed to a Childrens Court Judge.

3. That, to cope with the consequential increase in committals of children to a Childrens Court Judge, the President of the Childrens Court of Queensland be empowered to delegate Childrens Court jurisdiction to any District Court Judge according to the exigencies of each district.

4. That a Childrens Court Judge be appointed to Cairns and another to Rockhampton.

SENTENCING POWERS – ARE THEY ADEQUATE?

1. That a Judge be empowered to accumulate individual sentences of detention for multiple non-serious offences for up to seven years and that a Childrens Court Magistrate be empowered to accumulate such sentences for up to one year.

2. That a Childrens Court Magistrate, a Childrens Court Judge and a Court of competent jurisdiction be empowered to sentence a juvenile to detention for up to six months with follow-up probation for a period not longer than one year.

3. That the maximum number of hours community service a child aged 13 to 15 may be ordered to serve be raised from 60 to 100, and for a child aged 15 to 17 from 120 to 200.

4. That a Court sentencing a juvenile for a single offence be empowered to order both probation and community service.

Publication

1. That publication of Magistrates Childrens Court proceedings involving children aged 15 to 17 years be permitted, subject to the constraint on publication of any 'identifying matter' (*Juvenile Justice Act 1992*, s.62).

2. That attendance at Childrens Courts be included in the State School curriculum for all children over the age of 10 years and, to facilitate the implementation of this recommendation, liaison officers from the Departments of Justice and Education be appointed.

Cautioning

1. That if a child has been cautioned for an indictable offence that would attract seven years or more imprisonment if he were an adult, the caution be revealed to the Court if the child subsequently reoffends as a child.

2. That, if a person has been found guilty of two or more indictable offences for which convictions were not ordered to be recorded and the offences are of a type that, if committed by an adult, would make the adult liable to imprisonment for seven years or more, then that part of the person's juvenile criminal history should be revealed to a Court when sentencing for an offence committed by him as an adult.

3. That the victim of an offence committed by a child be entitled to be advised of the outcome of the offence involving the victim if the victim so requests.

4. That Section 19 of the Juvenile Justice Act be repealed.

5. That a child who is cautioned be given a 'notice' of caution instead of a 'certificate' of caution.

6. That senior police officers of the rank of Inspector or above, if available, administer cautions to children for indictable offences.

7. That statutory recognition be afforded to Aboriginal elders and respected persons to administer cautions to children of their communities in appropriate cases in their own right.

Parental Participation

1. That where the parent of a child in a proceeding before a Court has failed to attend the proceeding and the Court is satisfied on reliable evidence placed before it that there are reasonable grounds for believing that the parent has neglected the child or has failed or refused without good cause to exercise proper parental control over, or responsibility towards, the child, the Court be empowered to cause the proper officer of the Court to give written notice to the parent requiring the parent to attend the Court as directed in the notice and, in default of attendance without reasonable excuse, the parent be considered in contempt of Court and dealt with accordingly.

2. That the Department of Family Services and Aboriginal and Islander Affairs should assume the responsibility for ensuring that a parent of a child is advised of the time and place of the proceeding involving the child and that the Department should ensure, as far as practicable, that transport is provided for a reluctant or impecunious parent from his or her home to the Court and return.

Power of Arrest

1. That the power of arrest contained in s.20 of the Juvenile Justice Act be extended to cover a 'serious offence' as defined by the Act (or the recommended redefinition thereof).

2. That s. 32(1) of the Juvenile Justice Act be amended to provide that, consistent with the requirements of service of an attendance notice on a parent, a complaint need not be served on a parent if the parent cannot be found after reasonable inquiry.

Sentence Reviews

That the prosecution be given an equal right to apply for a sentence review of a sentence order made by a Childrens Court Magistrate as a child or chief executive acting in the interests of the child presently has pursuant to s. 88 of the Juvenile Justice Act.

Ex officio Indictments

That where proceedings are commenced by *ex officio* indictment the child have a right to elect to be dealt with by a Childrens Court Judge.

Childrens Court Budget

That the **financial** administration of the Childrens Court of Queensland be brought under the Department of Justice and Attorney-General.

Aurukun

1. That responsible and respected leaders of Aboriginal communities be empowered to participate actively in the juridical process and, in particular, be afforded statutory recognition as approved supervisors of probation and community-service orders.

2. That there be created a position, designated 'Aboriginal Assistant to the Court', to act in an advisory capacity to a Magistrate or a Judge sitting on a community Court.